

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

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THOMSON REUTERS ENTERPRISE CENTRE : CIVIL ACTION NO.
GMBH and WEST PUBLISHING : 20-613
CORPORATION :
Plaintiffs and : HEARING
Counterdefendants :
:
v. :
:
ROSS INTELLIGENCE INC. :
Defendant and :
Counterclaimant. :

James A. Byrne U.S. Courthouse
601 Market Street
Philadelphia, PA 19106
December 5, 2024
Commencing at 10:00

BEFORE THE HONORABLE STEPHANOS BIBAS

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Proceedings taken stenographically and prepared
utilizing computer-aided transcription

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1 (THE DEPUTY CLERK OPENS COURT)

2 THE COURT: Good morning. Please sit
3 down. All right. Madam Court Reporter, everything
4 visible, working? Most important person in the room.

10:04:28 5 This is Judge Stephanos Bibas, and my
6 designation in the District of Delaware, Civil Case
7 20-cv-613, Thomson Reuters Enterprise Centre GMBh,
8 et al. vs. Ross Intelligence, Inc.

9 Counsel for plaintiffs, please enter your
10:04:45 10 appearances.

11 MR. FLYNN: Good morning, Your Honor.
12 Michael Flynn for Morris, Nichols on behalf of
13 plaintiffs.

14 At counsel table we have Dale Cendali,
10:04:58 15 Miranda Means, and Josh Simmons from Kirkland & Ellis.
16 Behind them is Yungmoon Chang.

17 We also have two representatives from
18 Thomson Reuters: Katharine Larson and Jeanpierre
19 Giuliano.

10:05:09 20 THE COURT: Good morning to all of you.

21 And will plaintiffs be splitting this up
22 by issue or will Ms. Cendali be taking the lead on all
23 of them?

24 MS. CENDALI: Good question, Your Honor.

10:05:19 25 Ms. Cendali will start with the various questions, and

1 my partner, Joshua Simmons, will handle your other
2 questions.

3 THE COURT: Okay. So that the
4 infringement, et cetera. Okay.

10:05:35 5 And for defendant.

6 MR. MOORE: Good morning, Your Honor.
7 David Moore from Potter Anderson on behalf of defendant.
8 Joined by my colleagues Warrington Parker, Joachim
9 Steinberg, Keith Harrison, and Crinessa Berry.

10:05:52 10 And as far as the division of labor, I
11 will let Mr. Parker speak to that.

12 THE COURT: Mr. Parker, how do you --

13 MR. PARKER: I will be taking all
14 questions except for Number 6. Mr. Harrison will be
10:06:02 15 taking Number 6.

16 THE COURT: Number 6 being...

17 MR. PARKER: Undisputed facts.

18 THE COURT: Undisputed facts. So
19 Mr. Harrison, undisputed facts. Okay. Got it.

10:06:14 20 Thank you. All right. Let's start with
21 some logistics and scheduling. If there is a potential
22 trial next year, we have -- we're holding the week of
23 May 12th, but I'm wondering whether it is possible to do
24 this earlier.

10:06:35 25 The Court is available for a number of

1 weeks and can shuffle some things around, and I would
2 like to know what the barriers are on the parties'
3 schedules.

4 So, first of all, the last week in
5 January, do parties have any conflicts that can't be
6 moved from, say, Tuesday the 28th through Tuesday,
7 February 4th?

8 MS. CENDALI: Yes, Your Honor. We have a
9 big symposium that we organize for all our clients
10 throughout that week, which the invitations have gone
11 out. And it's also the week right after a Ninth Circuit
12 argument, which we would need trial prep time.

13 THE COURT: All right. Let's set that
14 aside. How about the second week of March, March 11th
15 through the 14th or 17th?

16 MS. CENDALI: At least with regard to
17 plaintiffs, Your Honor, we're -- maybe a path forward is
18 for us to meet and confer about schedules and report
19 back, because right now we have a three-week jury trial
20 in Florida in March, but, like anything else, sometimes
21 the things, move, change, things can happen. But right
22 now we would have a conflict.

23 THE COURT: Okay. You have a conflict
24 through March. When would that likely end?

25 MS. CENDALI: It's supposed to end on the

1 21st, but you never know when the jury comes back.

2 THE COURT: Of course. Of course.

3 The week of April -- maybe 8th through
4 the 15th? No, there's -- I don't remember -- I can't
10:08:28 5 remember when Passover starts this year. I don't know
6 if that conflicts with that.

7 MR. PARKER: I understand it's
8 April 12th.

9 THE COURT: Passover is April 12th. So I
10:08:37 10 don't want to put anyone in that situation.

11 We're holding the week of May 12th. Does
12 the prior week, May -- the week of May 5th work for
13 counsel?

14 MS. CENDALI: One of the issues with that
10:08:56 15 for us, Your Honor, is at least one of our experts is
16 out of the country and could not be there.

17 THE COURT: When does that expert return?

18 MS. CENDALI: Not until the 9th.

19 THE COURT: And what is that expert an
10:09:11 20 expert on?

21 MS. CENDALI: Damages.

22 THE COURT: Damages expert. Okay. But
23 that person would be back the 9th, so would be available
24 for trial the week of the 12th.

10:09:20 25 MS. CENDALI: Yes. Yes, Your Honor.

1 THE COURT: All right. So let's revisit
2 this later. It does sound like we're going to have some
3 real difficulty making this happen before May 12th, but
4 schedules are subject to change. If the March trial
10:09:40 5 goes away, perhaps counsel could, you know, notify, talk
6 with one another if that is a possibility. I don't know
7 if that's -- there's an issue on Mr. Parker's calendar
8 for -- during March.

9 MR. PARKER: The only dates in March
10:09:56 10 currently at issue would be March 24th to March 29th.

11 THE COURT: Okay. So those second and
12 third weeks in March would work if -- if plaintiff's
13 counsel trial winds up going away. So let's just
14 revisit this. Obviously as things go closer, sometimes
10:10:21 15 these cases settle or dismiss or go to summary judgment,
16 but the possibility of a trial beginning March 11th or
17 March 17th could work if the trial winds up going away.
18 At the moment, we will hold the week of May 12th.

19 MS. CENDALI: Thank you, Your Honor.

10:10:41 20 THE COURT: Very good.

21 Other logistical issues. I ask counsel,
22 both sides, split the cost of providing a transcript of
23 this hearing to the Court.

24 I am just going to remind you of the
10:10:53 25 hearing format we've set out. Each side prepared three

1 minutes of material on each of seven topics. We're
2 going to go topic by topic, back and forth.

3 On each of them, Thomson Reuters will go
4 first and ROSS will be some follow-up. I'll ask
10:11:06 5 questions as needed.

6 I also ask, when you're giving me -- you
7 know, there are a number of issues you briefed. You've
8 briefed them well, but they'll still help to go over
9 some of them orally. It doesn't mean I haven't read
10:11:20 10 papers. It will help the Court to the extent you can
11 provide citations and D.I. numbers rather than

12 Declaration X and Exhibit Y to Declaration X, just in
13 terms of there is a large record here, and the more
14 precisely I can find things, the easier it will be. And
10:11:34 15 as we get to each of these, I will -- I will try to ask
16 for some more specifics on where I can find things. And
17 if I can't find them, it will help direct me to them.

18 Our court reporter needs a couple of
19 minutes. The most important person in the room.

20 (Discussion off the record.)

21 THE COURT: Let's take a five-minute
22 adjournment.

23 (Brief recess taken.)

24 THE DEPUTY CLERK: All rise.

10:17:27 25 THE COURT: So we're starting with

1 Topic 1, the first fair use factor, the purpose and
2 character.

3 Ms. Cendali.

4 MS. CENDALI: Thank you, Your Honor.

10:17:50 5 Just as another housekeeping thought, I
6 see that there's some folks in the courtroom. We're
7 going to do -- I am going to do my best to navigate
8 confidentiality issues and sometimes speak generally and
9 not name any specific person's names.

10:18:07 10 It's kind of hard because we need to be
11 useful to you; that can't be too general. But I'm also
12 mindful of those other issues.

13 THE COURT: I understand. If I say I
14 need follow-up and you want a sidebar, we can talk about
10:18:21 15 that. I don't like sidebars generally, but that's a
16 legitimate reason for one.

17 Likewise, if I have a question for you
18 guys at some point, which is when you have, you know,
19 sealed stipulations of agreed material facts and things
10:18:33 20 like that, things I may need to use, want to rely on, we
21 are going to have to come to some agreed-upon way that I
22 can reference these things.

23 And I think it's important that opinions
24 generally be accessible to the public, but if there's a
10:18:52 25 need for specific redactions or crazy things at a higher

1 level of generality, I want a balance between showing
2 the public, you know, and showing Court of Appeals what
3 it's going to need too.

4 MS. CENDALI: Right. If your opinion is
10:19:00 5 to be useful and understandable, you obviously need to
6 cite some things.

7 THE COURT: Right.

8 MS. CENDALI: And however the Court wants
9 to deal with that, we would.

10:19:09 10 And then I guess in related housekeeping,
11 I'm going to try -- to the extent that Your Honor asks
12 about specific records, I may offer it, but for
13 Your Honor's potential savings is a cheat sheet in light
14 of your comment about the docket. The first means
10:19:27 15 declaration, which many of our exhibits are to, is for
16 Docket 678. The second means declaration is Docket 718.
17 And the Oliver declaration is Docket 679.

18 THE COURT: Okay. Means Number 1, 678;
19 Means Number 2, 718; and Oliver declaration, 679.

10:19:54 20 That's helpful.

21 MS. CENDALI: Thank you, Your Honor. May
22 I begin?

23 THE COURT: Yes.

24 MS. CENDALI: Turning to Your Honor's
10:19:57 25 first question, the first fair use factor, under Harper

1 and Row and its prodigy, Factor 1 requires consideration
2 of three subfactors: commerciality, bad faith, and
3 transformativeness.

4 The degree of transformativeness, if any,
10:20:12 5 needs to be weighed against commerciality and bad faith.
6 Here all three subfactors weigh against fair use.

7 On commerciality there is simply no
8 dispute that this use was commercial. This Court has
9 already found in Docket 547 that ROSS's uses were
10:20:32 10 undoubtedly commercial, and one of its goals was to
11 compete with Westlaw.

12 THE COURT: Then ROSS didn't dispute
13 commerciality.

14 MS. CENDALI: Absolutely not. But this
10:20:40 15 is important, Your Honor, though, under Warhol at 530
16 and 31, because the Court there re-emphasizes the
17 importance of commerciality, stating that when
18 commentary has no critical bearing on the substance or
19 style of the original, the claim and true fairness in
10:20:56 20 borrowing from another's work diminishes accordingly.

21 If it does not vanish and other factors,
22 like the extent of commerciality, loom larger. And
23 that's this case.

24 As to bad faith, ROSS' undisputed contact
10:21:10 25 constitutes bad faith. The Supreme Court held in

1 Harper & Row the propriety of the conduct as part of
2 Factor One is fair use presupposes good faith and fair
3 dealing.

4 In Harper, the Supreme Court found the
10:21:27 5 defendant knowingly exploited manuscript and ignored the
6 other side's rights for its own benefits.

7 This case is like Harper. This isn't a
8 case where the defendant merely reached out for a
9 license and was denied; rather, ROSS expressly was told
10:21:40 10 that accessing Westlaw for competitive purposes violated
11 Westlaw's terms of service, yet it was undeterred.

12 And, in fact, this case has a very
13 unusual record filled with deceit in which ROSS in
14 general here -- not naming names -- tried to get access
10:21:57 15 to Westlaw by having its executives pretend to be law
16 students, by convincing its law firm to share
17 credentials, by having an employee get access pretending
18 to be a solo practitioner; and, of course, by hiring
19 LegalEase to do indirectly what ROSS could not do
10:22:15 20 directly.

21 The law, we submit, should not condone or
22 encourage such behavior as the Second Circuit stated in
23 Rogers v. Koons, copying in bad faith primarily for
24 profit-making motives is not fair use. This Court
10:22:32 25 should find, respectfully, the bad faith subfactor based

1 against fair use.

2 And to the final subfactor,
3 transformativeness, ROSS cannot meet its burden of
4 showing its use was transformative, let alone
10:22:47 5 transformative enough to offset the significant
6 commerciality and bad faith here.

7 ROSS used the Westlaw content for the
8 same purpose as plaintiffs, which under Warhol weighs
9 against fair use. As Warhol said at 531 and 532, the
10:23:05 10 more similar the parties' purposes, the less
11 transformative the use, because they're more likely to
12 be substituted.

13 Here the purposes are identical. First,
14 ROSS' overall purpose in copying the Westlaw content for
10:23:19 15 the bulk memos was to create an admitted substitute, a
16 replacement for Westlaw. It's hard to find a more
17 clear-cut case of substitution than the facts of this
18 case.

19 ROSS was not just doing an artwork that
10:23:34 20 might have had some remote impact on someone else. It
21 was creating a product specifically designed to be a
22 commercial substitute for Westlaw, and it was marketed
23 that way to take market share from Westlaw, to bring
24 about the death of Westlaw contract, marketing ads that
10:23:52 25 said "ROSS or Westlaw"?

1 ROSS' purpose was to market a platform to
2 answer legal researchers' questions, which is
3 plaintiff's purpose too, one to one.

4 The Second Circuit held in ReDigi in an
10:24:06 5 opinion by Judge Leval that found no fair use; that when
6 a secondary use competes in the rights holders' market
7 is an effective substitute for the original, it impedes
8 the purpose of copyright to incentivize new creative
9 works by enabling their creators to profit from them.

10:24:25 10 Check, same way. The Court found that
11 that it used the competed directly with the original,
12 was not transformative.

13 Second, both ROSS and Thomson Reuters had
14 the purpose of using the Westlaw content as summations
10:24:40 15 and syntheses of factual legal issues selected and
16 arranged in comparing in categories, which you'll hear
17 more about.

18 Third, both ROSS and Thomson Reuters used
19 the Westlaw content for the purpose of training the
10:24:52 20 parties' respective AI search algorithm. Years before
21 ROSS was even founded, let alone commenced its steam,
22 plaintiff used its own Westlaw content for the specific
23 purpose of training its AI algorithms and to help to
24 learn how to find relevant law.

10:25:12 25 And ROSS also used the Westlaw content to

1 train its AI. It cannot be overemphasized, Your Honor,
2 that ROSS already had the pieces from another vendor.
3 What it lacked was the legal analysis of those cases,
4 the pairs of what's important and what goes with what,
10:25:30 5 that that's what it needed. And it admittedly
6 repeatedly in its depositions to find the relevant law
7 in answer to questions, the same way with the same kind
8 of analysis that ROSS's -- that Westlaw's attorney
9 editors did it.

10:25:47 10 It got that analysis from copying the
11 editorial judgment of Westlaw's attorney editors, as
12 reflected in part by copying the more than 20,000
13 question-and-answer headnote pairs ROSS used for
14 training. ROSS's whole platform was built on the facts
10:26:07 15 of Westlaw's attorney editors. It's set up to compete
16 with and substitute for Westlaw. It admitted it did, in
17 fact, take people from Westlaw. This is not a
18 transformative use as a matter of law.

19 THE COURT: All right. Thank you,
10:26:30 20 Ms. Cendali. A few questions for you.

21 When I'm considering transformativeness,
22 what do I focus on? Do I focus on the intermediate
23 step, what ROSS did directly with the material, which
24 was using it to train AI; or do I focus on the end, the
10:26:46 25 overall output of the project, the legal research tool?

1 And whichever answer you give me, why,
2 and on what authority?

3 MS. CENDALI: Well, you can look at it in
4 any way, most of the cases look at the overall purpose.
10:27:00 5 Most of the cases, like Warhol, look at what was the
6 ultimate purpose, what it's going to be used for, it
7 going to be used to illustrate a magazine, that was the
8 purpose.

9 There could be other purposes as well: I
10:27:13 10 want to create artwork, I want to do other things. And
11 those could be looked at; but, here, whether you look at
12 the highest level of purpose or a more narrow purpose
13 like just for training AI, either way, it's substituted,
14 and, therefore, not transformative.

10:28:46 15 (Pause in proceedings.)

16 THE COURT: All right.

17 MS. CENDALI: Just may I interrupt to
18 answer -- page 16 of our moving brief has a long
19 paragraph citing cases such as Paramount, Peter
10:28:59 20 Letterese, MGM, et cetera. It all stated that the
21 overall purpose does matter in the analysis. Our point,
22 though, is whether you look at it as the overall
23 purpose, whether you look at it as the slightly more
24 narrow purpose of -- to get answers to legal questions,
10:29:15 25 or whether you look at it as training data, either way,

1 all those purposes align.

2 THE COURT: Okay. Now, your framework
3 for arguing this is relying on the Second Circuit's
4 decision in Authors Guild vs. Google. Three factors:
10:29:34 5 commerciality, bad faith, transformativeness.

6 But I want to understand how I should
7 read that after the Supreme Court's -- that's 2015 --
8 how should I read that after the Supreme Court's 2021
9 decision in Google vs. Oracle. They didn't decide good
10:29:57 10 faith, yes or no, but there was some skepticism about
11 whether it plays a role. So how should I feel about
12 relying on the bad faith consideration and how much, if
13 any, weight should I give it post-Google?

14 MS. CENDALI: Well, two answers. One, as
10:30:09 15 Your Honor noted, the Court, in Google, just said, I'm
16 skeptical about this, but the Court did not take the
17 opportunity to overrule or change Harper, which remains
18 the law of the land and the law that the district courts
19 and the courts of appeals throughout the country have
10:30:27 20 followed.

21 Moreover, when you look closely, as I'm
22 sure Your Honor has, that opinion, the Court cited, in
23 particular, Campbell on that. And the concerning
24 Campbell there was about, Gee, I don't want to
10:30:42 25 discourage people from reaching out and asking for a

1 license because maybe that could moot a big expensive
2 case for a small license. So I am not going to hold
3 that against people if they reach out for a license and
4 were denied.

10:30:56 5 And that's why in my remarks I was trying
6 to distinguish that type of use where bad faith may not
7 matter as much from the type of bad faith here. In
8 Google, Google was not hiding what it was doing --

9 THE COURT: Right.

10:31:09 10 MS. CENDALI: -- unlike ROSS. So let's
11 point out that we only found out it was ROSS -- think
12 about it, Your Honor. There was all this advertising,
13 We're better than them, and ROSS versus Westlaw, come to
14 us, we're better -- not disclosing at all to the world,
10:31:22 15 to consumers, that it was actually built on all of our
16 judgments. And we only found it was them long
17 afterwards. Not so in Google and these other cases.

18 And that's why I say that I understand
19 that the Court made that comment, but I think you have
10:31:37 20 to look at it in context of --

21 THE COURT: All right. So context,
22 Campbell is the 2 Live Crew "Pretty Woman" parody.

23 MS. CENDALI: Yes.

24 THE COURT: In a parody case, like, we
10:31:48 25 are not really talking about good faith, bad faith,

1 like, the person being parodied, the whole idea -- well,
2 that's different -- Google is a commercial case, but
3 it's a commercial case where they're not hiding anything
4 and they're producing something different. And this is
5 a case where it is a commercial case but it's a
6 commercial case where undertelling, they're hiding it,
7 they got turned down for permission, et cetera.

8 So that goes beyond the factual context
9 that Google itself was confronting, and no reason to
10 think that having to reserve the issue would necessarily
11 foreclose considering it here. That is your argument,
12 right?

13 MS. CENDALI: That's exactly right. And
14 to be clear, though, Your Honor, I think the law of the
15 land is to assess each one of those points, but to be
16 clear, even if Your Honor said, I am going to give no
17 weight to that factor, we would still win because it is
18 incredibly commercial, as Warhol gave new life to, and,
19 you know, the days of transformatives being, you know --
20 the Litmus test is gone. And that was really clear.

21 THE COURT: How objective is good faith?
22 How amenable to summary judgment either as an objective
23 inquiry or as -- based on facts that are undisputed or
24 conceived here?

25 MS. CENDALI: Good question; but, here,

1 the facts of what occurred are not in dispute. There's
2 the actual e-mails, all of which were cited to, where
3 someone said, you know, specifically, I'm going to get
4 access on the false representation that I was a -- a law
10:33:27 5 student, you know, things like that. So when the facts
6 aren't disputed, there is no historical facts for a jury
7 to decide. It's really the legal interpretation of the
8 facts, which Your Honor can do.

9 But, again, if you wanted to write an
10:33:41 10 opinion that said, This is what I think, I think bad
11 faith, in my view, should apply here. It still exists.
12 But even if I chose not to because of the commerciality
13 and the lack of transformativeness, it would be the same
14 result.

10:33:56 15 THE COURT: What are your best record
16 citations for bad faith -- undisputed, undisputable
17 evidence that you say should be read as bad faith?

18 Now, Mr. Parker may read it differently,
19 but you're making arguments about what I should infer
10:34:13 20 from them.

21 MS. CENDALI: Exactly. And that evidence
22 would be -- forgive me.

23 It would be the first Means Declaration
24 678, at Exhibit 51. This is about their law firm
10:34:31 25 telling them that they couldn't get access.

1 THE COURT: Their law firm, ROSS's or
2 LegalEase's?

3 MS. CENDALI: ROSS's law firm, whose name
4 I will not mention, told them that they couldn't get
10:34:43 5 access. You will see also in our brief the very telling
6 thing from one of ROSS's executives saying, "Hey, come
7 on, they're not going to know about it." That's an
8 example of bad faith.

9 The other things: Trying to sign up law
10:35:01 10 students is first Means declaration, Exhibit 56, trying
11 to get access from the -- more about the law firm is
12 Means declaration, Exhibit 54, Exhibit 16, and receiving
13 a copy of the terms of service meaning brief at 9 to 10.
14 The thing I just mentioned that said, "My man, no
10:35:29 15 worries on it. Just keeping it under the hat for now.
16 Westlaw and Nexus need not know about it," that's in our
17 moving brief at 10, 24, and 25.

18 The posing as a solo practitioner is
19 first Means declaration, Exhibit 74 at 855, about
10:35:49 20 sharing a Westlaw Edge agreement and saying, "Here is a
21 quote I got from them under the false representation
22 that I was a solely practitioner in Buffalo."

23 I could go on, but the -- there they are,
24 a lot of them, in our moving brief at 12.

10:36:11 25 THE COURT: Okay, very good. Thank you.

1 And I think I will hear from Mr. Parker.

2 MR. PARKER: I am going to start with a
3 quote that was in Sony v. Connectix. It's quoting
4 Campbell vs. Acuff.

10:36:39 5 THE COURT: Uh-huh.

6 MR. PARKER: It says, "The question is
7 whether the new work supercedes the object of the
8 original creation or instead offers something new with a
9 further purpose or different character. Altering the
10:36:52 10 first with new expression, meaning, or message, it
11 masks, in other words, whether and to what extent the
12 new work is transformative."

13 To put all of this into context, because
14 there are big words used. There are words used like
10:37:08 15 "ROSS wanted all of the legal analysis." There are
16 words used that "it was built on the back of their
17 choice of what should be headnoted or not."

18 There were 25,000 memos. Of those 25,000
19 memos we've only been talking about the -- what I'll
10:37:28 20 call the "great" quotes. There are those 25,000. There
21 are 4 to 6 quotes in all of those memos. That's -- if
22 you want to take 5 as the average, that's 150,000
23 judicial quotes that are not tied to any headnote.

24 ROSS needed a full range -- and you will
10:37:49 25 find this in the Jimoh Ovbiagele declaration.

1 THE COURT: What do you mean "not tied to
2 any headnote"?

3 MR. PARKER: There is no allegation that
4 there was any headnote used to with locate any topical
10:38:02 5 quote, any good quote, any irrelevant quote. This case
6 has only been discussing headnotes as a small fraction,
7 one-fifth, of all the quotes used to train. The purpose
8 could not have been, and it's statistically impossible,
9 to have taken all of their work or nearly -- even a
10:38:27 10 fraction of the work. And we keep -- that is missing
11 out of this.

12 This was not an attempt to map headnotes
13 to quotes. It couldn't have been. Only one-fifth, at
14 most, of any quote would have been mapped to a headnote.
10:38:44 15 I am using their term of "mapped."

16 THE COURT: So let's say that's right.
17 What does that have to do with the first factor?

18 MR. PARKER: Because what we were doing
19 is, which is without dispute, featurizing these quotes,
10:38:59 20 the end questions matching the words. Without dispute,
21 we removed anything that would be mapping because it's
22 all a bunch of numbers. And we provided -- and I am
23 going to have to give you the record cites after because
24 I don't have them in D.I.

10:39:15 25 We have provided to this Court an example

1 of exactly what that looks like. We have in the
2 declaration of Mr. Marks that you can't reverse
3 engineer -- he tried -- Dr. Branting tried, Dr. Marks
4 accepts that as true -- and you can't get back to
5 anything close to the original expression.

6 We completely transformed it, in other
7 words, from an expression of any kind to how words, one
8 relate to the other, across 27 different things, without
9 dispute. Their expert, Dr. Krein, says, oh, you can
10 find it there, but he made no attempt to find it there.
11 He makes no attempt to show that in the final search
12 engine there is a key number, a headnote, or any
13 expression at all.

14 They suggested maybe there, but
15 Dr. Krein, this is at paragraphs 129 and 130 of his
16 opening report, had two days of access to our source
17 code. He could have located it and provided
18 specifically what he was talking about.

19 Let's go to the next step. When this
20 original was adjusted, the memos were adjusted, it went
21 into a training data aspect. Once ROSS arrived at those
22 numbers, those features, the training data -- just as
23 with Westlaw -- was moved to a side. It did not touch
24 the source code. The source code is a bunch of numbers.
25 We provided examples of what those numbers look like.

1 The purpose was to remove any human
2 intermediated content to make legal research cheaper.
3 Is that transformative? Oh, my goodness.

4 It's more transformative than what
10:41:09 5 happened in Sega. In Sega, they created new games
6 looking at someone's source code. In Sega, Sega still
7 had to tolerate new games being played on the game
8 system where they were competing by selling games as
9 well. And the Court found it was still fair use and bad
10:41:28 10 faith.

11 In Sega, they were negotiating a license
12 and they didn't like the terms, so they just went ahead
13 and did it anyway. And I don't see that bad faith; it
14 is different in degree but not in common.

10:41:45 15 And in Google, I cannot read Google to
16 say that Google was acting openly. Google 2 was
17 negotiating a contract with Oracle, and certainly Oracle
18 did not think they were acting in good faith, which is:
19 You were negotiating with us, you didn't like the terms,
10:42:05 20 and you decided to use it anyway.

21 THE COURT: There is no -- I don't recall
22 Google discussing anything about concealment.

23 MR. PARKER: I don't either, but they
24 made the bad faith argument, so I don't think it was
10:42:19 25 just open and notorious conduct that somehow then

1 elicited bad faith argument. There was a bad faith
2 argument made.

3 In Sony, which we were more
4 transformative, Sony had to tolerate connectors using
10:42:35 5 their games on a PC.

6 We don't make Westlaw tolerate our use of
7 their system. We don't make Westlaw tolerate our use of
8 their materials. We don't have those things.

9 Ooh, I just lost my train of thought.

10:42:56 10 Give me a second. But at that rate -- oh, I know where
11 I'm going.

12 So that begins to answer the same
13 purpose. And you asked about the intermediate and the
14 end. Let me tell you why we make that argument.

10:43:14 15 What their argument is, essentially, we
16 make use of this copyrighted material; we have a right
17 to control that copyrighted material. That is the
18 beginning of a fair use argument because in Sony, they
19 had the right to use that the copyright material, Sega,
10:43:35 20 Google had the right to use --

21 THE COURT: You want to make this case
22 looks like Sony, Sega, and Google, because there is the
23 intermediate use of the API or interface required to
24 make this work with a DNE system or something else, but
10:43:50 25 they're arguing, well, the ultimate problem still

1 competing in our space, which goes back some in terms of
2 market, and I think irresponsibly well, maybe these
3 games are competing with the Sony and Sega games.

4 MR. PARKER: I am saying two different
10:44:07 5 things here. So just say with the Factor Four because
6 that's where -- that's where that really comes in.

7 The question isn't whether or not we are
8 competing against Westlaw at all. The question is --
9 and I would like to give the quote for you, but I'd like
10:44:20 10 to wait and save my thunder.

11 The question is whether or not the
12 copyrighted materials are at risk under the Factor Four
13 analysis. Not with the Westlaw platform written large
14 is somehow under assault.

10:44:33 15 So let me go back. In all the cases when
16 you talk about -- when they talk about, We could have
17 used this and we could have done that, of course they
18 could have. That's why there is a copyright
19 infringement claim. That's why we have to, for fair
10:44:45 20 use, acknowledge there is some kind of infringement.

21 All right. And that's why I'm saying
22 Sega and Sony and Google, all of those cases are
23 companies that said, We actually use our source code to
24 make games, right? And so now there are cases -- and so
10:45:00 25 that's why looking at it at that step, where you're

1 actually using the copyrighted material, is not -- is
2 just the beginning for fair use. Because -- and the
3 reason you look at the end result.

4 THE COURT: So you agree we need to look
10:45:15 5 at the end result, though you think we need to start
6 with the immediate use.

7 MR. PARKER: Yes. Because all of their
8 cases -- and this includes their cases on page 16 of the
9 reply brief -- are cases that actually go to analysis,
10:45:29 10 Like you took the copyrighted materials and you made a
11 thing. This is what happened in Warhol.

12 And then the Court concludes, Well,
13 that's just derivative of the copyrighted material. And
14 that's where the word "derivative" comes in. That's
10:45:44 15 where the courts are saying, You have the right to
16 control your derivative materials. It is the conclusion
17 of a failed fair use argument.

18 In Warhol it was the same photo. It was
19 a copyright violation; it could not be fair use. And so
10:45:59 20 that's why I say to the Court, Let's ask how do you use
21 the copyrighted material? What ended up -- what was the
22 final result? And is that final result transformative?

23 And that's why Sony and Sega and Google
24 actually do apply. And let me just say Google is
10:46:20 25 transformative in that Google still contained the actual

1 copyrighted material. We don't have that either.

2 So, now, all of those cases, if you look
3 at page 16 of their brief.

4 THE COURT: Reply brief.

10:46:37 5 MR. PARKER: Of their reply brief, yeah.

6 So Paramount is -- tells a story of "Star
7 Trek." It's a book about the "Star Trek." Okay? Peter
8 Letterese is materials developed from a book. So the
9 end result is -- but that's not -- that's just

10:46:59 10 copyright. It's not the same purpose.

11 MGM is a play about "Gone With the Wind."
12 They're going to say that's not transformative.

13 Warhol is about a Warhol photo that just
14 had different colors. It has no different meaning, and
10:47:16 15 so that's not transformative.

16 And Wall versus Data, we could go through
17 all the Third cases where they cite it is just a
18 question that they are not transformative; they're
19 derivative. Wall Data is software programming.

10:47:31 20 And Worldwide is about the book "Mystery
21 of Ages." It's just reprinted.

22 They have another case about scientific
23 papers, where the guy just changes the author and adds a
24 couple of words.

10:47:48 25 That's why I'm saying for transformative,

1 you don't ask yourself, well, could the holder of the
2 copyright have done the same thing? That is never the
3 question because it presupposes you have the right to do
4 the same thing. But fair use allows someone else to
10:48:04 5 come along and use it to transform, and that's what I
6 mean by "end result."

7 THE COURT: Okay. Couple of follow-up
8 questions.

9 How did ROSS input the memos into the AI?
10:48:20 10 What can you tell me about that?

11 MR. PARKER: It was converted -- so I
12 will tell you at page -- let me quickly look at the
13 page -- but it didn't -- the question is not a true
14 question, so let me -- it didn't input it into the AI,
10:48:35 15 so... It took from memos and loaded them into a --
16 called CSV -- CSV, possibly.

17 THE COURT: Right.

18 MR. PARKER: It took about 80 percent at
19 a random level.

10:48:48 20 THE COURT: It sampled 80 percent of a
21 hundred?

22 MR. PARKER: Correct. 20 percent it set
23 aside because they were used for validation training. I
24 will give you the page cites.

10:48:59 25 THE COURT: Okay.

1 MR. PARKER: It then began to run -- it
2 liminized it, which is removing certain -- so instead of
3 stopping, it would become stopped. It removed like
4 gerunds, past tense, and so on.

10:49:12 5 It then began to featurize across 47
6 features. How many words separate this noun from this
7 verb? How long is an answer? How long is a word? How
8 many long words are in the answer? And so on. All of
9 these 37 features all described in Dr. Mark's deposition
10:49:38 10 evaluation.

11 THE COURT: Remind of where to find that
12 declaration.

13 MR. PARKER: I will, but I can't do it
14 right now. But if you don't mind --

10:49:45 15 THE COURT: Sure. Go ahead.

16 MR. PARKER: It then resulted in a series
17 of numbers. Those numbers are taken and then used to
18 train the source code. So there is no touch -- the
19 source code used for the legal search engine, there is
10:50:06 20 no touch between that source code and the actual memos
21 themselves, the words in the memos.

22 The training data, the memos, are pushed
23 to the side, because all they want is the series of
24 numbers stripped of expression, stripped of which
10:50:25 25 question came with which answer, because, of course,

1 part of the reason you want all of the different type of
2 answers is so that the AI can actually know how the
3 words relate to each other, so it can help figure out
4 what aspects mathematically make something less good or
10:50:43 5 more good.

6 And so the results are not the results
7 that you get from ROSS. There is no dispute. Is the
8 question that someone types in, which is not a question
9 in one of the memos; they wouldn't even know what the
10:51:02 10 memos were -- the question typed in in ten judicial
11 quotes. That's it.

12 THE COURT: So maybe that is the answer
13 to this next question, but say someone types in a search
14 using "ROSS." What precisely does it spit back? Just
10:51:22 15 ten judicial quotations ranked in order of
16 responsiveness --

17 MR. PARKER: Yes.

18 THE COURT: -- based on these 29
19 parameters?

10:51:29 20 MR. PARKER: 27 parameters exactly.

21 THE COURT: So -- and those parameters,
22 are they semantic, syntactic, kind of a mix, or both?

23 MR. PARKER: Let me find something for
24 you. Let me just...

10:51:58 25 So these things are mentioned in

1 Mr. Ovbiagele's declaration, Mr. Marks' declaration.

2 One of them is a feature called QER. It measured the
3 number of words shared between the question and the
4 answer.

10:52:14 5 Another is called Word2 -- the number
6 2 -- VEC, all one word. It generated a set of numbers
7 that represented the words of the question and answers
8 as real numbers in a vector space. I cannot tell you
9 what a vector space is. That is either closer or

10:52:32 10 further away from each other, based on the possibility
11 that the word would occur in proximity with another word
12 in the natural language.

13 Other features generate a number that
14 reflected something about just the question or answer
10:52:45 15 and not both; for example, the lexical generated a
16 number that represented the number of words in the
17 answer, the average word length of each word in the
18 answer, the number of sentences in the answer, and the
19 average sentence length in the answer.

10:53:00 20 And do you see how even that one has no
21 relation to the question and it has no relation to a
22 mapping, and it's doing this for all of the quotes, even
23 that are terrible, which don't come from Westlaw, and
24 they make no claim that any of the other four or five
10:53:19 25 quotes were taken and are subject to infringement,

1 because this case is not about wholesale taking legal
2 analysis from Westlaw, and they don't have the evidence
3 to show it. They try to make that argument, but as we
4 note in our fair use opposition brief, what they do,
10:53:39 5 they cite to things that are just widely out of bounds
6 in terms of that.

7 So the evidence is -- for purposes of
8 fair use, I know where we are. You're assuming in
9 Franklin for fair use. I don't think we have to assume
10:53:57 10 the scope of the infringement. They claim, I think, but
11 what the actual facts of that infringement are, at most,
12 a discrete number of headnotes, a very discrete number
13 of key numbers 5,000 or so at most, 500 judicial
14 opinions that our guys, undisputed, say, We don't want
10:54:19 15 this.

16 And that's evidence of -- when you talk
17 about bad faith, that alone, undisputed, when they
18 received an actual thing with all of the headnotes and
19 synopses saying, We don't want this stuff. This is not
10:54:33 20 useful to us.

21 THE COURT: What e-mail are you referring
22 to right now?

23 MR. PARKER: Hold on. I'll tell you that
24 just in a moment.

10:55:04 25 I might be able to find it faster for

1 you.

2 MS. CENDALI: Page?

3 MR. PARKER: Page 21 of ROSS's fair use

4 brief. It is Exhibit 63 to the declaration of

10:55:22 5 Ovbiagele. And the quote is ROSS said it was bad data

6 and they wanted to -- they wanted that stuff taken out,

7 that it was irrelevant from the data center.

8 THE COURT: This is e-mail from whom to

9 whom on what date?

10:55:36 10 MR. PARKER: It is -- that, now, I'm

11 going to need to do a little bit more work.

12 Do you have it?

13 MS. BERRY: It's from Thomas Van Der

14 Heijden to Terry Whitehead, who is an employee from

10:55:56 15 LegalEase.

16 THE COURT: How do you spell the last

17 name of the sender?

18 MS. BERRY: It's V-A-N, space, E-R,

19 lowercase, capital H-E-I-J-D-E-N.

10:56:02 20 MR. PARKER: And what date is it?

21 MS. BERRY: I don't have the date yet.

22 MR. PARKER: Okay. Terry Whitehead was

23 the principal at LegalEase to whom -- with whom ROSS was

24 interacting.

10:56:16 25 And then one final point on bad faith.

1 Exhibit 71 to the Means declaration. And, again, I will
2 get you the D.I. cite. It is an e-mail to LegalEase,
3 asking LegalEase to use Westlaw, lacks a source -- other
4 reputable source to create the legal memos.

10:56:42 5 The undisputed evidence is that ROSS did
6 not direct LegalEase to use Westlaw. The undisputed
7 evidence is that LegalEase was deposed by both sides.
8 The principal at LegalEase, the CEO, was -- said --
9 testified, without dispute, nothing contradicting it,
10:57:02 10 ROSS did not direct them to use Westlaw.

11 Terry Whitehead, again, the principal at
12 LegalEase, said, "I wasn't directed to use Westlaw, and,
13 in fact, we used LEXIS and Google."

14 So I think, again, that also finally
10:57:17 15 bears on what is or is not bad faith.

16 THE COURT: Thank you.

17 Unless there's any brief -- if you have a
18 brief, pointed response to anything specific you
19 disagree with in there, I'll listen to it briefly before
10:57:33 20 we move on to Factor Two [sic].

21 MS. CENDALI: Let me -- let me try
22 briefly.

23 MR. PARKER: I -- I --

24 THE COURT: Sorry. Mr. Parker.

10:57:39 25 MR. PARKER: We have the burden on fair

1 use, so, you know, I -- it is a little bit more than
2 following the rules of order, but...

3 THE COURT: That's a fair point. I just
4 want any factual rebuttal, like what Mr. Parker just
10:57:52 5 said is incorrect. And if you say that he misquoted
6 something or is taking something out of context, I will
7 let him respond.

8 MS. CENDALI: Thank you, Your Honor.
9 Just briefly, they're trying to use the trees and the
10:58:10 10 technology that mask the purpose, which is what we're
11 all in the case and care about, purpose. Not the how in
12 copying it. At one point, photocopying was the new
13 clever thing, but the law is clear that however you call
14 it -- and Arroyo is a really good example of that. We
10:58:24 15 cited that case.

16 You can do your own Rube Goldberg type
17 thing, but if it walks like a duck, it talks like a
18 duck, it is a duck. And, here, they train their content
19 -- and I'm saying -- the quote is on page 29 of our
10:58:41 20 brief -- because they needed legal questions mapped
21 directly to case passages that answer those questions.
22 Moving Brief 31: "We needed question-and-answer pairs."

23 And their own AI expert, Dr. Branting, at
24 first Means declaration 23, said that ROSS's algorithm
10:58:59 25 learned from the relationship between the pairs. And

1 that's how it answered the questions. That's this whole
2 point, because the whole way it worked was because our
3 editors did the analysis of saying, this is how you
4 answer a question, when you ask a question, you got that
5 answer.

6 There is really nothing more to it.

7 And I'm more than happy to explain why
8 this has nothing to do with -- first off, intermediate
9 copying is not a "get out of jail free" card. Sega
10 actually stands for that proposition. It can be
11 actionable.

12 This is not a case about code. This is
13 not a case about reverse engineering. It's not a case
14 about needing to do anything. Those cases are just not
15 applicable here, but I will stop.

16 THE COURT: All right. I will let
17 Mr. Parker respond limited to the points that were just
18 raised by Ms. Cendali, and then -- he'll have the last
19 word and we'll move on to Topic 2.

20 MR. PARKER: I am just going to respond
21 to the factual matter.

22 There is not a shred of evidence that the
23 only thing that ROSS returned was the quotes that
24 corresponded to a headnote. There is not a shred of
25 evidence that would be what, at most, 25,000 cases that

1 would be returned. There is not a shred of evidence
2 that it was so limited, that that's what they were
3 looking to do.

4 And, moreover, there is not a shred of
11:00:24 5 evidence that discarding 20 percent, randomly picking
6 which ones you're going to put in would ever obtain the
7 result that you were trying to copy the results that
8 Westlaw returned.

9 THE COURT: I am satisfied and thankful
11:00:40 10 for both of those presentations.

11 Now we'll go to Ms. Cendali on Topic 2,
12 the fourth fair use factor: The effect of the use on
13 the potential market for or value of copyrighted work.
14 I realize there is some connections to the previous one.

11:00:57 15 Please proceed.

16 MS. CENDALI: Thank you, Your Honor.

17 In Harper & Row vs. The Nation, the
18 Supreme Court stated that Factor Four is undoubtedly the
19 single most important element of fair use, and with good
11:01:10 20 reason, because Factor Four has the greatest potential
21 to impact the incentives that the Constitution was
22 intended to promote.

23 ROSS bears the burden of proving that the
24 secondary use does not compete with the relevant market.
11:01:27 25 Warhol at 49. Ross cannot meet its burden. Instead,

1 this is an odd case where plaintiffs submitted
2 overwhelming evidence that ROSS caused three primary
3 types of market harm or effect.

4 The first type of market harm is that
11:01:43 5 ROSS substituted for the original Westlaw work by
6 actively marketing Westlaw subscribers to switch to
7 ROSS. This wasn't just an incidental, it was -- the
8 whole purpose was to get them to switch. And, again,
9 market -- first Means Declaration 78 adds -- ROSS or
11:02:04 10 Westlaw adds touting the debt of Westlaw. First Means
11 Declaration 70.

12 ROSS developed a marketing plan to offer
13 discounts to customers who unsubscribed to Westlaw.
14 Means Declaration Exhibit 57.

11:02:20 15 ROSS's witnesses and experts testified
16 that ROSS not only intended to replace Westlaw, but
17 admitted that the ROSS platform actually did do this.
18 For example, one of ROSS's cofounders admitted that law
19 firms substituted ROSS or Westlaw. He was asked, "Did
11:02:39 20 you hope that law firms would stop using Westlaw and use
21 ROSS instead?" He answered, "Yes, and eventually they
22 did." First Means Declaration Exhibit 2, moving brief
23 at 9 and 15.

24 ROSS's 30(b)(6) witnesses also said the
11:03:00 25 intent was to create a replacement, and were users

1 indicating that they would replace Westlaw with ROSS?

2 Yes. Moving brief at 8 and 4 -- 14.

3 The second type of market harm presented

4 here is that ROSS diminished the value that plaintiffs

5 obtained by their own exclusive use of the Westlaw

6 content as training data for their legal research

7 algorithms. This isn't a post-comp kind of legal

8 argument. This is based on the facts. Plaintiffs

9 trained, using their own content, their own AI search

10 algorithms long before these folks came on the scene in

11 2010. Moving brief at 28 to 29.

12 We specifically trained it on the

13 question-and-answer pairs. They did the same thing, and

14 they deprived us as -- of our exclusivity. And a loss

15 of exclusivity -- is noted about the exclusivity about

16 the book -- about the part in Nixon and Nation -- is a

17 form of harm recognized in Harper.

18 Moreover, worse, talk about the facts, is

19 ROSS not only knew that exclusivity was important, but

20 it admitted it. And it admitted it because one of its

21 cofounders testified that he told -- ROSS told LegalEase

22 to destroy the bulk memos because ROSS did not want

23 somebody else to get the training data that was based on

24 our stuff so that they could, quote, create a machine

25 learning model that's comparable to if ROSS's.

1 Goose and gander is the legal principle
2 here. This is first Means Declaration Exhibit 13,
3 moving brief 16.

4 Ross can't now claim there is no value in
11:04:48 5 the training data when they themselves recognize the
6 value of it.

7 The third market harm is that ROSS
8 impeded plaintiffs' ability to license the Westlaw
9 content and its derivatives in the current market or in
11:05:02 10 the potential market for Westlaw content and its
11 training data. This kind of market harm is recognizable
12 in the Third Circuit in Murphy vs. Millennium.

13 Ross created a substitute legal research
14 platform, as they have admitted. This is the same kind
11:05:17 15 of harm in Davis vs. The Gap, in which the Second
16 Circuit held that by taking it for free they avoided
17 paying the customary price and caused a loss of royalty
18 and revenue and diminution of the opportunity to
19 license.

11:05:34 20 Same concept in Fox News Network,
21 which -- Mr. Simmons and I -- cases where the Court
22 said, Look, clearly, someone was willing to pay for this
23 and there's clearly a market effect here.

24 And, here, ROSS was willing to pay a lot
11:05:52 25 of money -- I won't say how much -- to get the training

1 data. It shows the value. None of that money went to
2 us had we wanted to do it.

3 I learned long ago, you don't make money
4 on losing money on every sale and making it up on
5 volume.

6 ROSS's copying, thus, more than, alone,
7 constitutes market harm. And ROSS can't meet its
8 burden. But the correct legal standard is not just to
9 look at ROSS, but to look at and examine whether the use
10 became widespread.

11 Campbell and Harper explained that it's
12 not fair when isolated instances of minor infringements
13 were multiplied many times become an aggregate, a major
14 inroad on copyright. Harper 569, Campbell 590.

15 Through decades of investment and
16 creativity, West and Westlaw have become the gold
17 standard in legal research. This has provided a huge
18 benefit for everyone using the legal system; lawyers,
19 clients, judges. You know longer need to look for a
20 teeny needle in a giant haystack to find relevant case
21 law. Yet, if the abuse became so widespread that
22 everyone were free to copy the Westlaw content to create
23 their own competing platforms, it would radically
24 undermine plaintiffs' constitutional incentive to keep
25 creating.

1 Why would plaintiffs continue to hire and
2 train attorney editors for generations if their work
3 could be copied by others and support other people's
4 businesses to come in and maybe charge less because they
11:07:36 5 don't the R&D expense? It makes no sense. And that's
6 why Harper was so create in finding Factor Four so
7 important.

8 If ever there was a case where Factor
9 Four -- and Factor One, Two, and Three -- made a
11:07:51 10 difference is this: ROSS simply cannot meet its burden.

11 THE COURT: So just one question to you,
12 and I am going to ask the same question to Mr. Parker.

13 So I see two possible markets here. One
14 is the market for legal research tools, the other is the
11:08:06 15 market for AI training materials.

16 As I said in, you know, my opinion
17 granting summary judgment on the antitrust
18 counterclaims, I don't view the markets here as well
19 defined. Does that -- that mattered for the end
11:08:24 20 opinion. Does it matter here in the fair use analysis?

21 MS. CENDALI: I don't think that this --
22 antitrust is so focused on market definition. That is a
23 different world than fair use. And Courts frequently --
24 and I, again, commend to the Court the decision in the
11:08:41 25 RTVI Fox News case, because it's typical in fair use

1 cases that you have multiple markets that are assessed.

2 You have the primary market, you have the
3 derivative markets, you have potential markets, all of
4 which are assessed because any one of them could be
5 relevant.

6 And that's the case here. You have such
7 an unusual situation, Your Honor, where there is an
8 overt use, choose us and not them. I don't think you
9 need to do more, and then lots of subsidiary things
10 about choose us and not them.

11 And then you also have the admitted
12 concept that there is a market for training data. We
13 use it ourselves. It's, you know, the experts admit
14 there is a market for this. And remember -- and forgive
15 me; of course you remember -- but the statute just says
16 "potential market," and so that's another way it's
17 different from antitrust. There hasn't have to be an
18 existing market. It just has to be a reasonably
19 anticipated, reasonable market that one could develop.

20 In every way you slice it, this was
21 harmful to us and caused market harm. And I don't want
22 to be corny, but I really do believe in this principle
23 of killing the golden goose. Like, it's great to have
24 derivative rights in society, and that's important, and
25 that's part of the purpose of fair use law. We get

1 that. But when the use is so overtly, expressly, and
2 intended to be competitive in this particular way on so
3 many levels, there is the danger of killing the golden
4 goose. And that's why Factor Four exists.

11:10:29 5 THE COURT: Thank you.

6 Mr. Parker.

7 MR. PARKER: So when the Court goes back
8 to read plaintiff's Factor Four analysis, I would like
9 the Court to focus on the fact that what they do is they
10 talk about the Westlaw platform.

11 This is a copyright issue, and I am going
12 to read a quote from Google versus Oracle, because the
13 question is not harm to the platform in all its aspects;
14 the question is what is the harm to their copyrights.

11:11:08 15 And that's the fourth statutory factor:
16 "Focuses upon the effect of a copy in the market for or
17 value of the copyrighted work." That's at page 35.

18 It then continues: "But a potential loss
19 of revenue is not the whole story. We must hear, must
11:11:33 20 consider not just the amount, but also the source of the
21 loss. A parody may kill demand for the original, but
22 this kind of harm, even if directly translated into
23 forgoing dollars, is not cognizable under the copyright
24 factor.

11:11:52 25 THE COURT: Right. Hustler versus

1 Falwell, Campbell, we get that. What does that have to
2 do with this case?

3 MR. PARKER: Because they have never told
4 you in all this litany what is the harm to their
11:12:02 5 copyrights. They tell you what happens to their search
6 engine, but not what happens to their copyrights. If
7 people want headnotes, synopses, all their copyright
8 materials, there's still only one source for it.

9 If they come to us, we don't have them.

11:12:26 10 To say that we harmed them because they have an
11 exclusive right to training data is nothing more than
12 what I said before, which is all copyright holders have
13 an exclusive right to use their copyrights as they wish;
14 and, unless your use is transformative, you're stuck
11:12:43 15 with a copyright violation.

16 But in every case, someone says, I could
17 have used that copyright that you used. I could have
18 used it too. But fair use recognizes that Google is
19 like, We could have come out with a phone using the same
11:13:02 20 APIs.

21 The Court said, Yeah, but that is the
22 fair use analysis. It's not whether or not they could
23 have put the same copyrights that are at issue that are
24 being fought over for fair use to the same use or not.

11:13:17 25 And understand, again, to go back to what

1 I said -- what I said previously, their cases are cases
2 where the conclusion is this is a transformative.
3 You're just using the same copyright. It works.

4 That's what Murphy is about that was
11:13:32 5 cited by Ms. Cendali. It's the same -- it's just
6 copying over; and, of course, you're not going to
7 satisfy Factor Four if you're copying over the same
8 thing without transformation.

9 Their potential market for AI training
11:13:48 10 data, there is not a shred of evidence that that has
11 been impacted. I'm setting aside that they never
12 planned to enter the market, and that's -- but there is
13 not a shred of evidence that it's been impacted. We
14 weren't in the market. There is literally nothing.

11:14:06 15 There is literally nothing. Conceivably, at most, they
16 have conceivably it could be impacted, but they don't
17 have anything that says it is impacted. They don't have
18 any dollar figures around how this would have somehow
19 usurped a market when we weren't even in the market.

11:14:25 20 THE COURT: Who bears that burden? You
21 guys approach Westlaw, they didn't want to sell it. You
22 took it anyway. I mean, why isn't that enough?

23 MR. PARKER: We are saying to the Court
24 there is nothing here. And I don't know how you can
11:14:44 25 bear burden when you say there is just literally nothing

1 here. The other side says, well, no, there is
2 potential, and they don't say anything more than that.

3 I think we have met our burden. There is
4 zero evidence. And so I don't know how you could prove
11:15:01 5 the negative where they say, No, but there is a
6 potential harm someplace.

7 THE COURT: Your argument seems to be
8 there is not an effect on the market, but they're not
9 denying that there is a market for AI training materials
11:15:15 10 for legal reasons.

11 MR. PARKER: I am forced to make that
12 acknowledgment because our expert actually said
13 something different than that --

14 THE COURT: Okay.

11:15:20 15 MR. PARKER: -- but this Court excluded
16 that opinion.

17 So I have to -- I have to assume right
18 now that there is a market for AI training data for
19 legal data. There is apparently no one in the market.
11:15:34 20 There is no evidence that there is anyone in the market.
21 There is no evidence that the market has been impacted
22 if there were a market. So I'm actually saying to the
23 Court, when we say, There is nothing here, we have
24 satisfied our burden.

11:15:49 25 It would be different if they said, There

1 is a huge market, and there was some evidence there was
2 market, and I said to you, Listen, there's evidence.
3 I've got nothing here on this.

4 THE COURT: As I asked Ms. Cendali, does
11:16:02 5 it matter that neither the market for AI training
6 materials or the market for research training tools is
7 well thought? That is something I talked about into my
8 antitrust.

9 MR. PARKER: I think it is -- there is a
11:16:15 10 problem at some point, because we are sitting here
11 telling you there is no evidence of there being a
12 market. I don't know what it would be. And you're
13 asking me, What is your burden here?

14 And I'm saying, However the way in which
11:16:29 15 these markets are mentioned by plaintiffs, my response
16 is there is no evidence.

17 And so, yes, their definition of what
18 these could possibly be would have made a difference,
19 perhaps, when you say, Have you carried your burden?
11:16:46 20 With what they said is their harm, as their injury, it
21 would be helpful to know.

22 And, also, let me begin. I am going to
23 go to Sega/Sony, because this is -- in Sega, the game
24 manufacturer literally had to tolerate people playing
11:17:01 25 games on their Game Station, even though they were in

1 the same business of video games.

2 You see, it's not just as you compete in
3 some general sense. They all look at what the copyright
4 issues are. Does the copyright survive.

11:17:16 5 And I'm saying here does the copyright
6 survive as AI training data? It does. They can
7 continue to sell it. We could not go out in the market,
8 and that's why I say we couldn't have impacted the
9 market. We are one person in the market that used,
11:17:31 10 except they couldn't derive income from us for that, but
11 that's true of all fair use cases.

12 Google refused to license. Sega refused
13 to license. And then when they say we used it for
14 ourselves, of course. So did Google, so did Sony, and
11:17:50 15 they started Oracle D.C. to say, We use this for the
16 same reason, I agree that's what they -- Sega used their
17 source code for the same purpose, which was to create
18 games. That's why that falls short.

19 THE COURT: All right. Here is a
11:18:06 20 follow-up question.

21 MR. PARKER: Yes, sir.

22 THE COURT: Your argument is, Look, I
23 distinguished all those cases on page 16 of the reply
24 brief because those were all non-transformative laws.
11:18:20 25 It sounds to me like you are taking what was a

1 Four-Factor balancing test and turning it into a test in
2 which Factor One is a threshold issue. And that
3 explains kicking all the others out, and then neatly you
4 can say this is different.

11:18:34 5 MR. PARKER: I am actually saying
6 something slightly different than that.

7 Factor Four does wrap around into Factor
8 One, and courts will say the more transformative it is,
9 the less you have a Factor Four analysis.

11:18:46 10 And so I don't mean to conflate them
11 purposely. I'm saying to you they are related to each
12 other. You start at Factor One, and by the time you get
13 to Factor Four and this happened is --

14 THE COURT: Has our Court linked them in
11:19:00 15 that way?

16 MR. PARKER: I am not saying they link.
17 I think courts have said -- and I am going to have to
18 get you a cite for that.

19 THE COURT: Is this Supreme Court or the
11:19:08 20 Third Circuit taking that approach?

21 MR. PARKER: I am not sure what approach
22 you're talking about.

23 THE COURT: Of making Factor Four, in
24 part, dependent on the transformative, this factor.

11:19:19 25 MR. PARKER: Hold on. I am going to ask

1 her a question.

2 (Discussion off the record.)

3 MR. PARKER: I do not.

4 So, no, I do not -- I believe Sega and

5 Sony both do that.

6 THE COURT: That's my understanding.

7 Okay. Ninth Circuit opinions. They don't bind them.

8 Why should they persuade me?

9 MR. PARKER: I believe the logic is this:

10 The more transformative, the less likely it will compete

11 in the market against the copyrighted materials that

12 were used. That's the logic because, again, it's not

13 about whether you compete in the marketplace, so it's --

14 THE COURT: For the court reporter.

15 MR. PARKER: I'm sorry.

16 The theory, I believe, is the more

17 transformative, the less likely that any competition in

18 the market will harm when Factor Four protects, which is

19 the copyrighted works, the original copyrighted works.

20 I think that is the theory.

21 THE COURT: All right. Very good.

22 Let me hear from Ms. Cendali. I think

23 there is some points you made that I would like to give

24 views on, and I will give you the last word.

25 MS. CENDALI: Thank you, Your Honor.

1 Three quick topics. First, it's
2 appropriate to look at the harm for the Westlaw platform
3 because the Westlaw platform contains the Westlaw
4 content, and that is the -- where we license that
11:21:37 5 content.

6 Second, there are two ways to obtain a
7 legal research platform based on those decisions and
8 judgments of the attorney editors. You can license
9 Westlaw or, unbeknownst to us until recently, you can go
11:21:56 10 to ROSS, and that's the problem.

11 Second point I want to make is with
12 regard to markets and licensing and the like. I am
13 quoting Dr. Seuss versus ComicMix at 489: "Fair use is
14 an affirmative defense, thus requiring the defendant to
11:22:17 15 bring forward favorable inference about relevant
16 markets."

17 All the evidence that exists here goes
18 our way, but even if we had done nothing, ROSS still
19 could not win unless it came forward.

11:22:33 20 THE COURT: That's Dr. Seuss on the
21 burden of proof, but cite me -- you said, All the
22 evidence goes our way. What are your best handful
23 pieces of evidence on the market?

24 MS. CENDALI: Well, I mean, two things.
11:22:47 25 First let me deal with it legally and then I'll go back

1 to it.

2 THE COURT: Sure.

3 MS. CENDALI: On pages 18 and 19 of our
4 moving brief, we explain the law in detail with regard
11:23:00 5 to potential markets, particularly for AI training,
6 which counsel admitted exists as a new market.

7 And there's no legal requirement, as they
8 seek -- my friend on the other side seek to emphasize,
9 Well, you're not currently selling it. There is no
11:23:17 10 requirement to currently selling it. It's on Judy
11 Caldwell.

12 THE COURT: It's a potential market will
13 suffice.

14 MS. CENDALI: That's right. And the harm
11:23:24 15 is that it's impaired by anyone like them that accesses
16 it without paying the customary price with regard to
17 data.

18 And then with regard to market harm,
19 again, among the evidence to cite for this -- and we go
11:23:41 20 through it in the brief -- is that moving brief at 19,
21 part of the Malinowski report, ROSS paid LegalEase X
22 amount of money to obtain this training data.

23 And under Fox News versus TBIs, the fact
24 that ROSS was willing to pay for it shows a plausibly
11:24:03 25 exploitable market, 883 F3d at 180.

1 Other research companies also use their
2 AI on their own platform. This is in Malinowski, which
3 indicates: "Demand first means declaration" -- at
4 Exhibit 28 -- "of the fact that ROSS required LegalEase
5 to destroy its copies of the bulk memos to prevent them
6 from selling them and licensing them to others" shows
7 and evidences the value of that Means declaration, first
8 Exhibit 13, the 30(b)(6) deposition transcript at 167:2
9 to 168:20, enumerated 16, that numerous other companies
10 currently license large portfolios of content for AI
11 training purposes, versus Means declaration; Exhibit 25,
12 Krein opposition report at 79 to 88.

13 It's like you asked me my best evidence,
14 and I'm like, Which child do I like the best? There's
15 so much evidence here, and the problem is we did our
16 best to present it to provide a complete picture, but it
17 isn't our burden.

18 THE COURT: All right. Now, let me go to
19 this issue I asked Mr. Parker about, which is, why
20 should I be persuaded that transformativeness matters
21 here?

22 If I turn it around, I say, Okay, look at
23 the parody cases. Look at Campbell versus Acuff-Rose.
24 Like, you could wind up tarnishing the market for the
25 song "Pretty Woman," by, you know -- belittling and

1 making fun of it -- it's syrupy, it's sappy, etcetera --
2 but that doesn't seem to be enough to prevent a parody
3 from being fair use. Does that meaning more general
4 principle is right, that transformativeness should
11:25:51 5 not -- either isn't relevant or should not loom large
6 under Factor Four?

7 MS. CENDALI: Well, there's a lot of
8 discussion about this, if you want to listen to the oral
9 argument in the Warhol case, and the Court chided the
11:26:07 10 friends arguing that case because they kept asking them,
11 Warhol is supposed to just be that Factor One, and what
12 they actually presented was transformativeness, but they
13 kept -- you know, counsel for Warhol kept bringing up
14 Factor Four, and the Supreme Court to was getting, I
11:26:22 15 think, very impatient, saying, This isn't about Factor
16 Four, this is about Factor One. And the opinion in
17 Warhol is all about Factor One. There's nothing --

18 THE COURT: I get that, but I think
19 Mr. Parker's point is Factor Four is downstream of
11:26:37 20 Factor One. Factor Four's influence, which is not
21 logically inconsistent with if we're arguing Factor One,
22 stick with Factor One.

23 MS. CENDALI: Well, just -- there's --
24 the factors are not in order. It says: "The Court
11:26:49 25 shall examine these factors, including other factors."

1 It's a nonexclusive list; often public policy is one of
2 them.

3 But as we know from Google v. Oracle, you
4 could start with Factor Two, you could start with -- you
11:27:03 5 know, ours restarted with Factor Four because it seems
6 so outcome determinative. So it's not really
7 downstream. They're independent considerations, all of
8 which, as I understand it, the Court should look at each
9 of the factors and then another factor, and then weigh
11:27:20 10 them and decide as a matter of law whether it's fair
11 use.

12 THE COURT: If I were Mr. Parker, I would
13 stand up and say, hey, you know, there are going to be
14 transformative uses that affect the market and you can't
11:27:33 15 use that to offer some genuinely new things.

16 MS. CENDALI: Two important points,
17 Your Honor. And I realize I wasn't giving you the most
18 clear answer to your question. Because as I was
19 alluding to earlier, there had been a thing in the law
11:27:53 20 Terau -- the case -- maybe that Seltzer case in the
21 Ninth Circuit, where some people argued that
22 transformativeness became a litmus test; that if it was
23 transformative, then that would be a domino effect and
24 all the factors would be like.

11:28:08 25 As we cited in our brief, Nimmer says

1 under Warhol that was Kahn. And the Warhol case was
2 very clear that each factor needs to be considered and
3 weighed. And the other key thing that Warhol said is
4 that transformativeness is one of degree. Like in some
11:28:28 5 of our cases, including the Fox News case and our
6 victory in the Harry Potter Lexicon case finding no fair
7 use, the Court said, well, maybe it was a little bit
8 transformative, but it doesn't matter because the market
9 harm so outweighed that.

11:28:46 10 Now, there is a difference in kind here.
11 This is not a parody case. They're not arguing that.
12 And the premise why parody is different is that no one
13 has the right to stop speech about critical things you
14 may not want. In fact, Thomson Reuters would be hard
11:29:02 15 put as a news organization to say that you shouldn't
16 stop criticism. But this isn't about criticism --

17 THE COURT: The First Amendment
18 considerations that call for leaving plenty of breathing
19 room for parody in a way that don't call for a more
11:29:19 20 classic IP evaluation.

21 MS. CENDALI: That's right. This is pure
22 substitution, and none of either sides' experts raised,
23 oh, there's some First Amendment issue here or anything
24 like that. This is licensing, not licensing, marketing,
11:29:31 25 head to head for competitive business, unbeknownst to us

1 based on our content.

2 THE COURT: I don't know if it's a
3 defective lecture, but you seem to have some issues with
4 the notebook up there. Do we need another lectures or
11:29:47 5 something to keep it in place?

6 MS. CENDALI: I have often had some
7 lectern issues, as my team would know.

8 But I apologize. This lectern slides
9 back. A lot of lecterns are flat. It's my fault for
11:29:58 10 putting too much on it. I hereby move things to the
11 second flat shelf and promise to do better.

12 THE COURT: I will ask my courtroom
13 deputy that maybe at the break we can look to see if
14 there's a flat lectern or flatter one or a surface area
11:30:11 15 or a second one we could move next to it to give her
16 some more options.

17 MS. CENDALI: Thank you, Your Honor.

18 THE COURT: Mr. Parker, the last word.

19 MR. PARKER: Thank you, Your Honor.

11:30:27 20 So I guess I want to start here. We have
21 to be careful when we talk about things like the Fox
22 News case and all these cases because in Fox News,
23 again, that's not -- they were just taking clips and
24 it's not transformative. And you sort of get to that
11:30:47 25 end result, you can look back and say, well, of course

1 everything else sort of follows from that because you're
2 in the same market, it's the same material and so on.

3 THE COURT: We have a spectrum of
4 transformativeness. And you're arguing this is pretty
11:31:01 5 far along; I think the counter argument would be this
6 isn't genuine AI, this is AI being used as a search tool
7 that's looking at things like word distances and word
8 lengths and a whole bunch of stuff that is not at all
9 intuitive. But you're right, this is not a cut and
11:31:18 10 place or a simple spitting back.

11 MR. PARKER: Right. But I also want to
12 say the market that was just discussed is entirely not
13 what fair use cares about. Fair use does not say you
14 look at the copyrighted materials used and determine
11:31:36 15 whether the copyrighted materials used had a particular
16 market. It doesn't. Because there is no fair use case
17 that could actually work.

18 Like in Google, Oracle had use for the
19 API. They even tried to license it. It did not have
11:31:56 20 value. In sake of the source code used, it did have
21 value. They tried to license it. They almost got it
22 licensed. So that we use the copyrighted materials,
23 that -- paid for or not, that we used it and that there
24 was another -- that West and plaintiffs could have used
11:32:19 25 it for the same purpose and made money on it, fair use

1 doesn't ask that question because fair use assumes that
2 copyrighted materials have value because they are
3 exclusive.

4 What Factor Four says is now having used
11:32:34 5 those copyrighted materials, does what resulted compete
6 in the market to injure the original copyrighted works?
7 And again, there's not a shred of evidence that there
8 was any impact on the market, that they could not go
9 out, if they decided to change their mind, and sell as
11:32:58 10 much as they want because ROSS was never in that
11 business at all. In fact, the affirmative evidence that
12 was just cited to you, that ROSS wanted everything
13 destroyed. So there was no possibility that ROSS was
14 going to enter that market.

11:33:12 15 THE COURT: Just a moment.

16 (Brief pause.)

17 THE COURT: All right. Let's move on to
18 topic 3, question 3, the type of copyright compilation
19 derivative created that Thomson Reuters' holds needs
11:33:36 20 disputed part of Westlaw of headnotes number system and
21 any implications for the strength of copyright
22 protection.

23 Now, this is mainly Mr. Simmons, but I am
24 going to flag for Ms. Cendali, I am going to circle back
11:33:51 25 to linking this up to factor 2 and fair use or whether

1 you would want to chime in on this. But let's go with
2 Mr. Simmons first.

3 MR. SIMMONS: I will always welcome Ms.
4 Cendali's commentary on fair use.

11:34:03 5 Your Honor, let me give you the punch
6 line on your question. Westlaw is an original creative
7 work that is protected as a compilation of copyrighted
8 constituent material and it's headnotes, the West Key
9 Number System, and other choices are all entitled to
11:34:19 10 ordinary copyrighted protection.

11 Now, Your Honor's taxonomy in the
12 question, the creative derivative compilation matches
13 footnote 3 from the Eleventh Circuit's decision,
14 Intervest Construction versus Canterbury. And two
11:34:33 15 things struck me in rereading that opinion.

16 First, the court's statement that, "When
17 crucial question in the dispute involving compilations
18 is substantial similarity at the level of protectable
19 expression, it is often more reliably and accurately
11:34:49 20 resolved in a summary judgment proceeding."

21 Second, it's not clear to me that the
22 Eleventh Circuit's factor categories are mutually
23 exclusive because you could have a compilation that's
24 based on something else, that's also creative --

11:35:02 25 THE COURT: And when I read your

1 briefing, I want to pin down your position. It seems to
2 me that you are arguing both that the key number system
3 as a whole is a compilation and the compendium as a
4 whole, the headnotes is a compilation. But you also
11:35:17 5 want to claim that the headnotes themselves are, I
6 believe, derivative works. It's hard to argue that
7 these are original creative works, but they're
8 derivative even though you don't claim a headnote that
9 -- a copyright of the original judicial opinion.

11:35:31 10 MR. SIMMONS: So to answer the first
11 question, yes, we do claim they're multiple copyrights.
12 And in fact, the Eleventh Circuit is the only circuit
13 that I'm aware of that actually does this categorization
14 separating out to this or this or this. Most courts are
11:35:43 15 looking for what's the original expression. So it's
16 either in the text or it's in a compilation through
17 selection and arrangement, and it could be both, as
18 Your Honor recognized in your first opinion.

19 I will circle back to the derivative work
11:35:56 20 question because there is a very clear answer on that,
21 but I want to start with the compilation because I think
22 the Eleventh Circuit's opinion was a little unclear in
23 that when it was talking about compilations, it meant
24 factual compilations, and the law is extremely clear
11:36:10 25 that factual compilations are a completely separate

1 thing than other kinds of compilations.

2 THE COURT: This is not Feist. I get
3 this is not Feist.

4 MR. SIMMONS: Okay. So, you know, your
11:36:23 5 opinion before made that clear. And so from our
6 perspective, this isn't Feist, we're not in a thin
7 compilation world. We are in a rich copyright within a
8 copyright world, and you can find copyright protection
9 at multiple levels. So that distinguishes us from all
11:36:39 10 the cases that ROSS is citing with regard to
11 compilations.

12 THE COURT: Now, that's as to the
13 headnotes.

14 How about as to the key numbers?

11:36:50 15 MR. SIMMONS: So the key numbers also
16 protected by levels. The terms that are used in the
17 West Key Number System are not fact. It's not like
18 there's some thing that you can discover in nature that
19 says, ah, this is the marine cases or this is whatever.
11:37:06 20 And Dr. Lighter, which was ROSS's expert, who came in
21 trying to say this is somehow required, actually
22 testified in his deposition -- and I have the citation
23 later in my outline -- that you could have done this any
24 different way, that a legal research platform doesn't
11:37:22 25 need to have a key number system, you could organize it

1 different way. And in fact, Westlaw has done it
2 different ways. Every year they go back and they go
3 through the key number system and they say, oh, actually
4 we think it should be this way or that way, maybe this
11:37:32 5 will be more understandable to people.

6 So it's not a thin copyright in the key
7 number system either, and you know that because it's not
8 -- again, it's not a factual compilation. So you can
9 use the Eleventh Circuit reasoning. You have to go
11:37:49 10 through and say, it's not a factual compilation, is it a
11 derivative? If not, we are back to original copyright
12 principles. Which, by the way, it's the only way the
13 Third Circuit has ever looked at anything. They don't
14 -- this whole concept, I can't find much in the Third
11:38:03 15 Circuit's law.

16 THE COURT: So your position is neither
17 the Supreme Court nor the Third Circuit tells me to do
18 this boxing and I shouldn't or don't need to go through
19 that.

11:38:12 20 MR. SIMMONS: Exactly.

21 THE COURT: We will hear from Mr. Parker
22 about that.

23 MR. SIMMONS: Sure. Let me address the
24 derivative-work question, because there's actually a
11:38:20 25 case that gives us a very clear answer on how to deal

1 with that, which is a case that ROSS cited for a
2 different proposition, but we are repeating for the
3 argument, it's Ets-Hokin versus Skyy Spirits, which is a
4 Ninth Circuit case, and that court explained that for
11:38:33 5 work to be categorized as a derivative work, it --
6 quote, "The work from which it derives must itself be
7 within the ambit of copyright." That's 225 F.3d 1068 at
8 1079.

9 So -- and that was based on the court's
11:38:50 10 reading of the text of the copyright act, which keeps
11 talking about copyrightable works in the derivative
12 context and looking at the legislative history.

13 So the Ninth Circuit says that's -- you
14 just don't go there. And in this case, where -- what
11:39:02 15 they are saying that headnotes are based on judicial
16 opinions that, under Georgia versus Public Resource,
17 aren't copyrightable. We just can't be in the
18 derivative work world; we're in creative world. And so
19 that sort of answers the question on derivative works.

11:39:17 20 THE COURT: So derivative is useful when
21 you are thinking about, all right, you need a license
22 from the original author, and you need a license from
23 the person who derived it. It's a useful concept of
24 those topics. In this context, no. I mean, we -- but
11:39:34 25 that doesn't get rid of the whole arguments.

1 They're saying this is -- this is, you
2 know, thickness and thinness is a spectrum. Feist is at
3 one extreme end of the spectrum. I agree with you, this
4 case is further along than Feist, but this is not a
11:39:50 5 novel either. This is not someone just came up with
6 characters in a plot out of whole cloth, right.

7 So how does the thinness or thickness
8 along this spectrum matter or play into it, and where
9 along the spectrum should I put both the headnotes and
11:40:06 10 the key numbering system?

11 MR. SIMMONS: I don't think that -- once
12 you get out of the thin protection that talks about --

13 THE COURT: Okay.

14 MR. SIMMONS: -- I don't think it really
11:40:14 15 matters for the purposes of this case. Because once
16 you're out of factual compilation and your out of
17 derivative work in that categorization, you're in
18 creative. So now we go to just, is it original? And
19 you just do the analysis that your Court -- the Court
11:40:27 20 already talked about in its opinion. As Your Honor
21 knows, Feist standards are extremely low, ^teeth I have.

22 Ms. Cendali, at the pretrial conference,
23 and Your Honor had a conversation about Feist, and the
24 quote was, "Even a directory that contains absolutely no
11:40:45 25 protectable written expression meets the constitutional

1 minimum for ^ protection if it features an original
2 selection and arrangement." That's Feist at 348.

3 Likewise, the Third Circuit in Kay Berry
4 versus Taylor Gifts noted that, quote, "All creative
11:41:05 5 works draw on the common well spring that is the public
6 domain," and so when an author combines those elements
7 and adds his or her imaginative spark and the
8 imaginative spark occurs, the author is entitled to
9 protection and the result.

11:41:22 10 And so when Your Honor wrote your prior
11 opinion, you cited to L. Batlin & Sons for the
12 proposition that all the author needs to contribute is
13 something more than merely trivial variation, something
14 reasonably his own.

11:41:35 15 So when you look at this case, you think
16 about all the things that Westlaw did, you can read
17 Thomson Reuters's cases editorial manager, Lori Oliver's
18 declaration, that's D.I. 679, that Ms. Cendali gave you
19 at the start of the argument.

11:41:51 20 And she gave us all kinds of judgment and
21 creativity that go into not just the West headnotes, the
22 key number system, including the head of text itself,
23 the choice to make something even a headnote, where in
24 the opinion to make something a headnote, that sort of
11:42:03 25 linking concept, and those are all clearly original

1 choices that are entitled to protection.

2 And it's not just me saying that. The
3 Eight Circuit in West Publishing versus New Data Central
4 said that explicitly. It discussed the judgment and
11:42:17 5 creativity of West editorial process at 799 F.2d 1219 at
6 1226, where it goes through and says this is
7 protectable.

8 Indeed, headnotes are the classic example
9 in all on the Government cases of what is the
11:42:33 10 protectable thing in all the materials that people work
11 on.

12 And I will note that although that prior
13 opinion is before Feist, it's remarkably consistent with
14 the law after Feist.

11:42:44 15 The Second Circuit in CCC
16 Information Services versus Maclean held that even
17 evaluations of vehicles are protectable, and the reason
18 was the professional judgment and expertise involved.
19 That's 44 F.3d 61 at 67.

11:43:02 20 And so there is no question that Westlaw
21 and the copyright material in this case are entitled to
22 protection for all on the original material that was
23 added. There's is just no reason that we need to get
24 into a debate about how thin or thick we are. It's, was
11:43:14 25 it trickily different? If so, protectable, we move on

1 to the next step in the analysis.

2 THE COURT: So you say it doesn't matter
3 for the copyright infringement question. Does it matter
4 for ^firm Factor 2, the nature of the copyrighted work?

11:43:29 5 And if you want to consult with
6 Ms. Cendali, that's fine, or she may answer.

7 MR. SIMMONS: Yeah, she -- I will cede
8 the podium to Ms. Cendali on that, but I'll say to you
9 the punch line there is also no. It's still protected
11:43:42 10 because the nature of the work is also on the spectrum,
11 and so where you have something that's original like
12 this, you're not in that limited ^fair use. But let me
13 cede the podium to Ms. Cendali.

14 MS. CENDALI: The answer is, it doesn't
11:43:59 15 matter because the Westlaw Content is kindly created as
16 Mr. Simmons indicated, and their own expert, as we
17 detail and agree, not only says that we do it
18 differently, but competitors such as LEXIS. They didn't
19 have headnotes at first. Then they decided to have
11:44:21 20 headnotes. And then they had -- they made headnoted --
21 a different of headnotes per cases, and they will write
22 them differently. That is their own expert saying that.

23 So there is ample creativity there, and
24 not only that, there is another element in Factor 2 that
11:44:36 25 hasn't gotten as much light, which is that we also

1 invested substantial labor and time to create the
2 Westlaw content with the expectation of financial
3 return.

4 And in the Hustler Magazine case, Ninth
11:44:55 5 Circuit, 796 F.2d 1148 to 1153, ^and well data, in
6 assessing this factor, courts considered both whether it
7 was ^created imaginative and original, and whether the
8 copyright holder invested substantial labor and time.

9 THE COURT: All right. So your answer
11:45:09 10 is, legally, you agree with what Mr. Simmons said, that
11 yes, there is a spectrum. But fact- -- your answer is
12 fundamentally a factual one in that we are on the right
13 hand, could have strongly protected end of that
14 spectrum.

11:45:23 15 MS. CENDALI: Yeah. I think the facts
16 are undisputed as to what these things are, what the
17 headnotes are and what West ^ waybills. No one says
18 that it was a black of marble that you found on the
19 beach. This required judgment and thought, much more so
11:45:42 20 than in the car-kind-of-case assessments that were
21 indicated.

22 And law is hard, and anyone could recode
23 or reprocess one of your own opinions, probably, in
24 different ways. You yourself might do it differently
11:45:57 25 than the West editors do, and they change it over time.

1 So the point is that in looking at factor
2 2, it is -- it is creative, and therefore, it should be
3 entitled to protection.

4 Let me put it this way, simplify: There
11:46:12 5 is no way Factor 2 should favor them. That's the bottom
6 line.

7 THE COURT: All right. Your answer is
8 clear.

9 Mr. Parker.

11:46:20 10 MR. PARKER: I don't want to pander to
11 the Court, but I'm going to pick up sculptures.

12 Sculptures you find marble, they're hard
13 to do. It is a skill; it's not done in one day. And I
14 make the most beautiful octopus sculpture in the world,
11:46:50 15 but I spent 10 years doing it.

16 That sculpture is construed in this
17 subject to the thinner copyright protection than the
18 book that my 5-year-old writes in 15 minutes.

19 All that work that you do, it may be
11:47:11 20 creative, but all that work you do, the amount of
21 energy, does not translate into the thin or thickness of
22 copyright protection. And they don't have a case that
23 said it because the only case that really gets at it is
24 Feist, and its sweat of the brow is not a factor.

11:47:32 25 And if you read their briefs, and they

1 tell you how many people work for so long to make the
2 most careful selection of headnotes, it still doesn't
3 answer what copyright protection should apply. They
4 give you no case that says a compilation, however well
11:47:54 5 done, should somehow get anything more than thin
6 protection. There is not a single case they cite.

7 THE COURT: But, Mr. Simmons, those make
8 the argument that, you know, this is -- I should be in
9 the Eleventh Circuit's boxes here.

11:48:10 10 MR. PARKER: But there are only three
11 boxes. It's creative, compilation or derivative.

12 THE COURT: He's arguing that that's --
13 if I were the Eleventh Circuit, I would have to follow
14 that, but saying I'm here --

11:48:21 15 MR. PARKER: There's -- every case we
16 cite -- we are not just talking about Eleventh Circuit
17 cases. We cited a bunch of cases from a bunch of
18 different places that said compilations received thin
19 protection --

11:48:33 20 THE COURT: Why is this --

21 MR. PARKER: -- nothing.

22 THE COURT: Why is this in -- but this
23 isn't Feist. There's more originality than Feist.

24 MR. PARKER: That depends on what we're
11:48:43 25 talking about. Because we keep going between headnotes

1 as words and headnotes as something else.

2 The key numbers are a way of stacking and
3 racking and organizing. Of course there are multiple
4 ways to do that because that's true of Feist too.

11:49:03 5 That's true of any compilation case; that's what makes
6 one compilation creative and original.

7 If there was only way to do it, it
8 wouldn't be creative nor would it be original. We would
9 just move on; there would be no protection.

11:49:16 10 So when we're talking about headnotes as
11 they relate to key numbers, and key numbers as they then
12 stack and rack cases, that is a compilation. And it
13 does not matter, it does not change whether it's thin or
14 thick. There are other ways to do it.

11:49:33 15 Because again, if there were no other way
16 to do it, there would be no copyright.

17 THE COURT: Sure. But their argument is
18 that the protection is not exclusively compilation. In
19 Feist, it is a bunch of names and the phone numbers that
11:49:47 20 themselves aren't protected. Each individual headnote
21 is protectable as well.

22 MR. PARKER: Now, then -- that's -- then
23 we are not talking about headnotes as part of a
24 compilation. And that's where, I think, we're -- we're
11:49:59 25 saying you can't just muddy it up and just say, this is

1 this. We're saying, compilation thin. If you want to
2 go and look at the individual works within a
3 compilation, then let's talk about those individual
4 works. But you can't just mash it up and say, the
11:50:18 5 combination of the two is somehow different, and no case
6 says that.

7 They could say they don't want to be in
8 the Eleventh Circuit box, but they certainly don't tell
9 this court that there is any other case that is accepted
11:50:33 10 or viewed, that if it's all the same, you just mix it
11 all up and you go from there. And that's not what the
12 law is.

13 Now, let's talk about headnotes
14 separately now. Okay. There are two different issues,
11:50:44 15 but let me address Issue Number 1.

16 In page 22 of our opposition on fair use,
17 it's other places. We cite two cases.

18 Alfred Bell & Company, which is the
19 reproductions of public domain paintings were derivative
11:51:05 20 quotes.

21 We have Allen Greene, which they don't
22 cite. It's a 1944 Eastern District of Pennsylvania case
23 that was affirmed in the Third Circuit that say, Art
24 objects depicting public domain religious shrines were
11:51:22 25 derivative works. So in other words, the underlying

1 thing, at least in the law of this circuit right now,
2 does not need to be copyrighted. They are derivative,
3 and therefore, they're subject to protection.

4 Secondly --

11:51:38 5 THE COURT: So, wait. What third --

6 MR. PARKER: Yes, it is --

7 THE COURT: What in the Third Circuit

8 says I have to understand derivative copyright as
9 applying irrespective of whether the underlying document

11:51:52 10 was in the ^Public domain or not.

11 MR. PARKER: Correct. And again, that is
12 at page 22 of our opposition at the bottom after the
13 page.

14 THE COURT: So you're not disputing that
11:52:02 15 a single work can both be individually detectable and
16 part of a compilation?

17 MR. PARKER: Correct. When we discuss
18 this part of a compilation, we are not talking about the
19 words -- it's just how it helps organize.

11:52:13 20 THE COURT: Right. And then when you

21 kept referring to earlier arguments in structure

22 sequence organization, there's like, well, there's

23 possible additional creativity involved in the structure

24 sequence organization that is not exclusive of the

11:52:26 25 creativity of each underlying headnote.

1 MR. PARKER: Each underlying work, so --
2 yes.

3 THE COURT: Yes.

4 Do you view the key number is as merely
11:52:38 5 protected compilation?

6 MR. PARKER: They have to be because they
7 can't be protected under copyright. They are just
8 single words. They don't do more than that. The don't
9 do anything.

11:52:51 10 The only -- as standing alone, a key
11 number that says "labor and employment" is not a
12 copyrightable thing. It's not subject to -- it's --
13 works -- it becomes copyrighted in a way that you
14 organize cases underneath that; that is a compilation.

11:53:11 15 THE COURT: I sometimes look in the front
16 of a West book, and I see a list of key numbers that
17 almost serves as a table of contents or on index. So we
18 are not talking about two words in isolation; we are
19 talking about a whole list of them that is a taxonomy
11:53:33 20 for the law.

21 MR. PARKER: Which is a compilation, yes.

22 So -- again, loss my train of thought,
23 but I'm going to get there again. Oh, here we go.

24 The next step, and what is not mentioned
11:53:54 25 here, is however much effort the thought process goes

1 in, there are constraints that they impose. Not us;
2 they impose. And we cite to Lori Oliver, and we cite to
3 their desire. The desire -- and their request is that
4 headnotes follow the words of the judicial opinion.

11:54:20 5 The desire and need is for lawyers to be
6 able to locate cases using headnotes. They have
7 constrained it, and it's separate and apart of whether
8 or not it's derivative. They constrained the expression
9 in such a way that it can't be subject to extreme
11:54:40 10 copyright protection.

11 And again, however creative it is however
12 much effort it takes, copyright doesn't look at the
13 effort. It just says, what is the expression? And is
14 this expression original? And does it have a minimum
11:54:59 15 level of creativity.

16 THE COURT: Anyone who has taught
17 students knows the difference between the students who
18 think they deserve an A for effort and the students
19 being evaluated on the fruit of their work.

11:55:10 20 MR. PARKER: So independently of whether
21 it's derivative, independently of whether it's a
22 compilation, they have so constrained it that it can't
23 be subject to broad copyright protections. And if it
24 were -- so you're going to hear more about this probably
11:55:29 25 infringement, but when they literally quote the language

1 of a Court and put in the headnote and someone says, ah,
2 that language is good, but it's literally the language
3 of the judge, they can't claim the copyright over that.
4 They just can't. Otherwise, their headnote just could
11:55:50 5 be filled with quotes from the Court.

6 And the fact that they decided to, they
7 think, pick the best parts, that is a great idea, right?
8 But we're not here -- you've never heard us litigate,
9 and copyright law doesn't ask the question, is it true
11:56:07 10 that it was really good or really bad; or you did a good
11 job of what you were trying to do. Copyright looks at
12 the expression itself, not whether it's the best
13 selection, the worst selection. That's not even a
14 debate we're having.

11:56:25 15 Now, you ask about factor 2. First of
16 all, as the Court knows, this factor does not weigh that
17 heavily at all on these things. Second of all, there
18 are cases -- they actually don't -- their cases are
19 apposite to this. Harper & Row is about an unpublished
11:56:45 20 manuscript, and I can tell you now, courts crunch pearls
21 if you produce an unpublished manuscript. That means
22 that factor 2 analysis is much, much different. That is
23 the Love vs. Kwitny.

24 The rest of the cases, like Fox, again,
11:57:01 25 we are at places where the courts are saying, hey,

1 listen, this looks exactly like the original work or
2 this is not different than the original work. Those are
3 the cases.

4 So in sum, there are different modes of
11:57:19 5 analysis, but first you could just look at constraints
6 itself. In the MGA -- the Mattel vs. MGA case is one
7 case. You could look at what I call the trivial pursuit
8 case, which is a cite, Sintelva (sp.) is another
9 constrained case. You can look at the newspaper case,
11:57:40 10 and we cited one, where those are constrained. And then
11 you can leave behind, if you wish, which bucket any of
12 this stuff falls into. But I think we're right, a
13 desire to tell this Court I don't want to be in any
14 particular bucket is not useful if there is literally
11:57:56 15 not a single case that allows someone to just say I
16 don't want to be in a particular bucket.

17 THE COURT: Just one moment.

18 (Brief pause.)

19 THE COURT: Please proceed.

11:58:31 20 MR. SIMMONS: Okay. Third Circuit case
21 compilation, not thin. Educational Testing Services vs.
22 Katzman, that Your Honor cited in your prior opinion,
23 that was a case where there was a compilation as to the
24 whole set of questions and then each individual question
11:58:46 25 was also protected.

1 THE COURT: Is this the ETS does SAT, I
2 think --

3 MR. SIMMONS: Correct. It's the test
4 questions case. And so Your Honor relied on that in
11:58:57 5 saying that even when you have a compilation copyright,
6 you could also have a copyright for the things that make
7 it up. So that's the Third Circuit's law. The way they
8 analyzed that case is the way they analyze all the cases
9 in the Third Circuit. Is it trivially different from
11:59:10 10 whatever came before or is it just something creative?
11 It's the same test. So that doesn't do anything in
12 terms of those cases.

13 In terms of -- I promised you the Lighter
14 citation to their expert. That's 678-7. That's the
11:59:27 15 deposition transcript where he discusses his opinions
16 and essentially concedes that there's lots of different
17 ways that these things can be done.

18 In terms of the issue of we constrained
19 it, but the idea that we had made a determination this
11:59:44 20 is how it's going to be. Yes, that's called creativity.
21 That is our originality. We told our attorney editors
22 the way we want to do this is this particular way. You
23 can't come back later on and say, oh, once you made that
24 choice to do it this way, now you lose protection.

12:00:00 25 THE COURT: Just a moment.

1 Mr. Deputy, could you turn down the
2 volume. I think he's a little louder than Ms. Cendali.

3 (Brief pause.)

4 MR. SIMMONS: And I can give you a couple
5 of cases. The one that I like because -- we argued,
6 that is Oracle v. Google at the federal circuit on
7 copyrightability, which was not reversed by the Supreme
8 Court. That's 750 F.3d 1339, 1360. And what the
9 federal circuit did there is collect a variety of cases,
10 all which stand for the proposition that it's the
11 copyright owner that gets to decide and you can't then
12 say, oh, it's constrained later and you lose protection.

13 Another one, if you want to, is Apple
14 versus Formula. That's 725 F.2d 521, 524. That's the
15 Ninth Circuit saying the same thing. So that doesn't
16 get them out of the box either.

17 In terms of the key number system, it's
18 not just single words. As Your Honor noted, it's
19 textonomy. And in any case, they are our words. If you
20 started talking about things as, oh, if you just look at
21 the words in isolation, then I do the same thing to
22 sentences in a book, you can't say that because each
23 word in a sentence is a word, suddenly you lose
24 protection in the combination.

25 The point we're making is, when you put

1 all the things that we are adding together, you look at
2 what we did, and that's what's protectable and that's
3 what they copied. And you know that it was valuable
4 because they took it. If they had wanted to just use
12:01:35 5 the judicial opinion text, they had that. It is
6 conceded fact. They didn't need judicial opinion text.
7 What they wanted was someone who wrote it differently.

8 And that's because the way that the
9 artificial intelligence operates is if you gave it just
12:01:54 10 the judicial text and said here's the judicial text, it
11 wouldn't know what to do when someone comes up with a
12 new question. The value of the headnotes and the reason
13 that they went to the headnotes is that they are
14 different; that when a human person then comes along and
12:02:06 15 says the same thing that's in the headnote, out pops the
16 judicial opinion that our attorney editors identified.
17 That is the reason that headnotes are valuable.

18 THE COURT: Now, Mr. Parker placed some
19 great stress on there being only 25,000 headnotes here,
12:02:23 20 whereas there were 25,000 memos and a whole bunch of
21 other quotations in them that weren't being challenged.
22 What do I do with that?

23 MR. SIMMONS: Thank you so much for
24 asking. The 25,000 memos had one question copied
12:02:36 25 directly from a headnote, I'm going to talk about that

1 later, but there is a best practices guide that
2 LegalEase produced that said here is how you create a
3 question: Go to the headnote of each -- go to the key
4 number, but each headnote, convert that into a question,
5 and that's the question. And there is a guide that I
6 have citation for at the desk that is actually the
7 step-to-step directions to do that.

8 The answers are selected in a -- are
9 labeled with different types of things. Great quote is
10 the top one, and then it goes down from there. The
11 great quote is what the AI is trying to learn to
12 produce, and the great quote was always the case that
13 was connected to the headnote. So --

14 THE COURT: So the number one answer was
15 the infringing answer.

16 MR. SIMMONS: Correct.

17 THE COURT: And the others were
18 deliberately designed to be worst ones. So the training
19 value was in picking the preferred one and you wouldn't
20 want the lesser answers to be the ones that were taken.

21 MR. SIMMONS: Correct.

22 THE COURT: Got it.

23 MR. SIMMONS: So number one, our stuff.
24 And then all the ones that are bad and listed as being
25 worse and worse and worse are not.

1 So that's the whole -- and then the AI
2 learns that that's what the attorney editors thought.
3 And that's why, again, the value comes from us, that
4 comes from our work, and that's what they're copying.

12:04:01 5 Let me end by talking a little bit about
6 fair use. So Mr. Parker, we were up to this question of
7 labor. So just to be clear, Wall Data is a post Feist
8 case. The case that Ms. Cendali was quoting, 447 F.3d
9 769, is after Feist. And what the Ninth Circuit held is
12:04:22 10 that even after Feist, when you talk about nature of the
11 work, you can look at more than just creativity, that
12 you're not restricted. Because the point there is, what
13 is it -- you know, what do we want from the copyright
14 system? And maybe there is a work that, from the
12:04:36 15 copyrightability point of view, has less creativity to
16 it, but if it was really labor intensive to create, as a
17 system we still want to have that protection.

18 So Wall Data is one case on that subject.
19 It cites to others that are pre-Feist, MCA versus
12:04:52 20 Wilson. And what's interesting about MCA v. Wilson is
21 that case is favorably cited by the Supreme Court in
22 Google v. Oracle. So continuing vitality of that
23 concept --

24 THE COURT: Right. But there is no
12:05:09 25 dispute that sweat of the brow alone is not enough.

1 MR. SIMMONS: For copyright.

2 THE COURT: For copyright, right, yes.

3 MR SIMMONS: For nature of the work and
4 fair use, it is relevant.

12:05:15

5 THE COURT: Got it.

6 MR. SIMMONS: And so that is really
7 important in -- not so much in this case because I think
8 it's all creative, but in cases where you're trying to
9 cite, should I allow someone to start pilfering the
10 golden goose's eggs, to take Ms. Cendali's example, if
11 it's really labor intensive, perhaps you should not do
12 so. And that's what Wall Data is saying.

12:05:28

13 THE COURT: I have this image of geese
14 going into labor that I don't --

12:05:41

15 (Laughter.)

16 MR. SIMMONS: At least it's gold eggs,
17 though. That distinguishes it.

18 The last thing I'll say is on bad faith.
19 The bad faith cases are not restricted to pilfering. In
20 LA News v KCAL, which is a Ninth Circuit case shortly
21 after Campbell, the Court actually does find bad faith.
22 And it is based on the idea that, yes, you can ask for a
23 license and be rejected, but when you know you need one,
24 when the facts are clear that that is something that is
25 required, that could be bad faith. So it is not just

12:05:52

12:06:06

1 this secret thing being stolen. But even if it was,
2 let's be clear, Westlaw is behind a password-protected
3 website. It's something that you actually have to do a
4 direct contract with West to get access to. So it's not
5 so far afield as other cases involving bad faith.

6 THE COURT: Thank you. The last word to
7 Mr. Parker.

8 MR. SIMMONS: I think I get the last
9 word. It's our burden. But I will let Mr. Parker.

10 MR. PARKER: The Best Practices Guide.
11 So --

12 THE COURT: This is the guide --

13 MR. PARKER: Let me start at a different
14 place, and then I will introduce it.

15 THE COURT: Okay.

16 MR. PARKER: There was an argument --
17 there was an argument that the search results returned
18 the best quotes, and not a shred of evidence of that,
19 nothing. Not in their expert reports at all.

20 The evidence is that when we trained, you
21 actually break apart the questions and answers
22 completely, so you would not have a relationship between
23 a question and answer at all because, again --

24 THE COURT: Where would I look in the
25 record for that?

1 MR. PARKER: Let's see. Let me find -- I
2 am going to give page cites.

3 The first place that it would appear is
4 pages 13 to 14.

12:08:12 5 THE COURT: Of?

6 MR. PARKER: Of our opposition to their
7 fair use brief. Let me find our fair use brief.

8 It is at page 21, 22, 23, 24, 25, 26.

9 There was a reference to how the Best Practices Guide

12:08:52 10 directed -- Best Practices Guide was a guide that was
11 created by LegalEase to govern how they would prepare
12 memos.

13 THE COURT: By the way, I don't know
14 whether either side can tell me where the Best Practices
12:09:09 15 Guide is.

16 MR. PARKER: Yes, I can. And we are
17 going to give you the D.I. number, but it's Parker
18 Declaration Exhibit 28. And all of this is referenced
19 at page 8 of our opposition to the fair use brief, so we
12:09:24 20 will give you the cites that will help you out with
21 that.

22 The Best Practices Guide was a fit
23 document created by LegalEase that governed how it would
24 prepare memos.

12:09:35 25 The Best Practices Guide, quote, "The

1 headnotes are proprietary, and you should not copy,
2 paste them in the question."

3 The contract attorneys were instructed
4 not to copy headnotes into questions, and so quite
12:09:55 5 contrary to what was just represented, the instructions
6 were not to create -- make headnotes in the questions.
7 Just, it's not supported by the record. The record says
8 something quite different than that.

9 And so when we're talking -- the Court
12:10:11 10 said there were 25,000 headnotes. There are not. There
11 are 25,000 memos. They accuse us on 21,000 headnotes.

12 The only headnotes that they are accusing
13 us relate to the great question, and what is -- when
14 they provide the idea that there is a motive to
12:10:32 15 essentially copy those things and make it into, it is
16 relevant to know that one-fifth of the materials used
17 were unrelated to any of the accused headnotes, that the
18 great quotes -- the 21,000 headnotes represent less than
19 1 percent of all the 28 million headnotes.

12:10:55 20 I mean, it is a vanishingly small. There
21 is no -- there is no explanation how the vanishingly
22 small amount could somehow then become the entirety of
23 Westlaw. And again, they have no evidence of any --
24 they don't have -- we have declarations, and output is
12:11:19 25 nothing related to Westlaw. There is nothing here like

1 that. And they don't have anything to contradict that
2 at all.

3 Now, a few other things. I think that it
4 is a very difficult argument to support that the author
12:11:35 5 gets to determine the level of protection for the
6 copyrights. I think it's just tough, right, because
7 that wouldn't make sense. A sculpture who scopes an
8 octopus would spend more time than a 5-year-old writing
9 a 10-page novel, and the 5-year-old would get greater
12:11:55 10 protection without even thinking.

11 I -- it is not the author's prerogative.
12 It is a legal conclusion of what type of protection is
13 afforded regardless of what the author may think.
14 Otherwise, there is no way to regulate the law because
12:12:09 15 --

16 THE COURT: It would seem like the
17 reasonable position to ^meld, too, is it's the evident
18 amount of manifest effort in the works. Someone
19 couldn't just run up a thousand hours on something that
12:12:28 20 was trivial.

21 But it's the kind of thing that takes a
22 long time to make that would seem to weigh in favor of a
23 factor two finding.

24 MR. PARKER: But I think it's not so. It
12:12:40 25 can't be so. Because if I created a compilation that

1 listed every human being in the world --

2 THE COURT: Right. Right --

3 MR. PARKER: -- it would still be a
4 compilation.

12:12:54 5 THE COURT: It's still compilation
6 because the question is the amount of effort required
7 for the creative contribution in there and the simply
8 the compile, compile, compile, compile is not a creative
9 addition.

12:13:10 10 MR. PARKER: Then I could decide over
11 that 20-year period that there are many different ways
12 that I can put this together, many, many different ways.
13 And I do it in a certain way. I do it by hair color; I
14 do it by height. I actually cross-reference height,
12:13:27 15 hair color and so on; that still doesn't make it
16 anything but a compilation.

17 THE COURT: That's a fair point.

18 MR. PARKER: And the danger is, and if
19 you start doing this, there are things that are very
12:13:41 20 creative that don't take long at all. Right. People
21 write novels in a week; other people write novels over a
22 lifetime. Ralph Ellison wrote Invisible Man over one
23 period of time. Right.

24 THE COURT: There is the flash of
12:13:59 25 insight. Samuel Taylor Coleridge wrote, you know, *From*

1 the *Ancient Mariner* having just come out of drug-induced
2 haze. It just all flowed out.

3 MR. PARKER: Correct. And there it is,
4 subject to the greatest copyright protections ever.

12:14:14 5 Also, what are the metrics for it? It's
6 very difficult to have a metric for that creative
7 effort. Is it a dollar amount? Which is what they are
8 suggesting. Is it the number of hours? Which they
9 don't tell you. They just tell you people work really
12:14:29 10 hard at it.

11 And I am not taking that away, but there
12 is no way to measure in an author saying, I worked
13 really hard on this, and therefore, thick protection.
14 And another saying, I can't prove to you how hard I
12:14:44 15 worked, but -- yeah this is -- you list this again,
16 right, subject to, and that's the problem.

17 THE COURT: Okay.

18 MR. PARKER: All right.

19 THE COURT: All right. I think both
12:14:53 20 sides -- I think this is a good time for a lunch recess.
21 Let's adjourn and reconvene the one o'clock sharp.

22 (Lunch recess.)

23 THE COURT: Good afternoon. All right.
24 I want to thank the parties for being well-organized.
13:01:10 25 We've made good progress through Questions 1, 2 and 3.

1 Let's move on to Question 4, whether each headnote must
2 be evaluated individually. Whether findings about
3 individual or groups of headnotes can be extrapolated.

4 Mr. Simmons.

13:01:31 5 MR. SIMMONS: Your Honor, because you had
6 asked for some citations. The best practices guide that
7 we discussed before the break is at 678-36, that is the
8 D.I. citation. And I will command the Court to page 4
9 where it talks about using best practices guide to frame
13:01:52 10 questions; page 8 where they actually show a headnote
11 being converted into a question; and page 13 where it
12 discussions using the connected case as the quote.

13 Turning to Question 4, "This case is
14 well-suited to extrapolate findings about the headnotes
13:02:11 15 because the parties do not dispute what the headnotes
16 are, just whether they are legally protectable.

17 As Your Honor and Ms. Cendali discussed
18 at the pretrial conference, all of the headnotes are
19 protectable under Feist both because of Thomson ^Reuters
13:02:24 20 in selection and arrangement and the judgment of its
21 attorney editors about what should constitute a
22 headnote, and that could decide the issue completely.
23 But if Your Honor wanted to look at protectability other
24 ways, there is other ways to look at it.

13:02:38 25 Another way to decide protectability is

1 to use the groups of headnotes that are categorized in
2 Dr. Kron supplemental report, Appendix B. That's 690 --
3 it D.I. 690-6, -7, -8, -9, -10 and -11.

4 THE COURT: This is attachments -6 -7 -8,
13:02:58 5 -9, -10, and -11. So six attachments for a single
6 spreadsheet.

7 MR. SIMMONS: What the spreadsheet does
8 is it gives you all the headnotes in the case, all the
9 questions that were created from them, and the judicial
13:03:10 10 opinions that are associated.

11 And then in the right-hand column, it
12 categorizes every single judicial opinion to headnote
13 based on five different categories: One is where there
14 is a changed order of judicial text; two is where there
13:03:29 15 was substantive addition to or subtraction from the
16 judicial text; three is where the judicial text was
17 condensed; four is where it reflects Thomson ^Reuters as
18 attorney editor, selection and arrangement; five is
19 where multiple of those are at issue.

13:03:46 20 So the categories, what actually happened
21 between judicial opinion and headnote, there is no
22 testimony disputing that that's the correct
23 organization. And even if there was, the headnotes
24 themselves would supersede and control contrary
13:04:02 25 descriptions of them. That's ^P Eric Guido Architecture

1 versus Simone Development in the Second Circuit, 602
2 F.3rd 5764.

3 So the only question you have to look at
4 if you want to extrapolate is, what kinds of evidence am
13:04:17 5 I talking about, and do I think that reordering, making
6 substantive changes, condensing, selection and
7 arrangement, are sufficient -- or more than trivial
8 variations from the judicial opinions. If Your Honor
9 decides that act is more than trivial, then that whole
13:04:36 10 category is protectable and comes out. So that is a
11 second way that you can slice the protectability.

12 The third way to do it would be to use
13 ROSS's own submissions, and there's three of them we can
14 talk about.

13:04:49 15 Before I do, though, I know Your Honor is
16 familiar with engineering dynamics versus structural
17 software. The district court in that case at 785 F.7,
18 576 at 583, said what you had said to us at one of the
19 pretrial conferences, that even if you copy a small
13:05:14 20 amount of material, you're still liable, there's still a
21 judgment in your favor, quote, "The extent of copying
22 would just be relevant to a determination of damages."

23 But, just looking at ROSS's own
24 submissions, we can slice this -- if we get three
13:05:28 25 additional ways.

1 One is Your Honor asked ROSS, quote, to
2 "submit a list of all headnotes it believes are verbatim
3 quotations or vary trivially from verbatim quotations of
4 judicial opinions. That was your order at 612.

13:05:42 5 Out of all the headnotes that are issued
6 in this case, ROSS submitted a subset and left 5,367
7 headnotes out of the submission in response to your
8 order. That submission is D.I. 617, and all of the
9 headnotes that didn't put in are at 678-27.

13:06:03 10 By excluding those roughly 5,000
11 headnotes from a request you made saying tell me what
12 the ones that are verbatim or just trivial, that should
13 be taken as an omission that the other 5,000 are
14 indisputably more than that because it is their burden
13:06:19 15 to say what the unprotectable elements of the headnotes
16 are.

17 We also look at this from the perspective
18 of ROSS's software expert, Ms. Frederiksen-Cross. I
19 deposed Ms. Frederiksen-Cross on her analysis. I walked
13:06:32 20 her through how she was comparing judicial opinions to
21 headnotes to questions, and we produced what is now
22 678-21, which is a document using her spreadsheet
23 filtered to just the headnotes that are different from
24 judicial opinions and similar to questions under her
13:06:54 25 analysis, and that gives you 2,830 headnotes. So you

1 could use that subset.

2 Finally, you could use the attorney
3 declaration that ROSS submitted in opposition to this
4 round of briefing in the Kanter declaration.

13:07:11 5 Now, as we noted in our reply brief, that
6 declaration is wholly inappropriate. You cannot, as an
7 attorney, put in expert testimony explaining why you
8 think something is protectable or not. That's just not
9 how it works. You have to have an expert do that,
13:07:21 10 disclosed, deposed.

11 I am going to accept, for the purposes of
12 this, that Your Honor considers that declaration and
13 doesn't strike it. In that analysis, what they did was
14 they took the two sets of headnotes that I just
13:07:37 15 discussed, they deduped them because there is some
16 duplication, and they came up with 5,695 headnotes.

17 Now, they then subtracted out things that
18 they think are unprotectable from that, which is only
19 slightly over a thousand.

13:07:53 20 So even using the attorney declaration at
21 the end of summary judgment with all the benefits of
22 everything in the case, their declaration still left
23 4,534 headnotes on the table. So whether you do this
24 from all of them are protectable, whether you do it from
13:08:12 25 the perspective of using Dr. Krein's filtration and just

1 deciding it's a legal matter if those categories are
2 protectable or not, or you use one of the many
3 submissions that ROSS made, all of that can be used to
4 extrapolate up to what the protectable headnotes are,
13:08:25 5 and it is wholly appropriate for the Court to do so.

6 THE COURT: One question for you. So in
7 your briefs, you say, "I can find direct infringement of
8 the headnotes in the key number system based on a subset
9 of the headnotes on the period of more than de minimus
13:08:41 10 copying."

11 Now, I can understand what infringing
12 some headnotes could be enough to show infringement of
13 compilation as a whole under a compilation period. But
14 I don't understand how is it that infringement of some
13:08:53 15 headnotes could be enough to show infringement of other
16 headnotes on an individual copyright theory?

17 I mean, maybe, at most, you can get a
18 jury to infer such things, but that would be a fact
19 question at trial; certainly not a summary judgment
13:09:06 20 amenable question.

21 Does this mean the way you pitched your
22 briefing, that you are only seeking damages under the
23 compilation theory?

24 MR. SIMMONS: No. No to both of those.

13:09:17 25 So what our point was is at summary

1 judgement, the question was: Can we report into a
2 judgment under Rule 54, which requires us to meet the
3 elements of our claim, ownership of available copyright
4 and copying of the constituent elements that are the
5 original?

6 If we show more than de minimus copying,
7 then judgment should be to us.

8 The engineering dynamics case that I
9 discussed earlier says we can then deal with that in
10 damages, which the jury is going to have to wade
11 through. But from a summary judgement, let's not make
12 the jury have to make that determination. That's all
13 Your Honor has to do. That's why you the can slice it
14 and dice it in multiple ways. If you find there is some
15 protectable headnotes and those headnotes have been
16 copied, we win on summary judgment.

17 THE COURT: Except for damages, the jury
18 is still going to have to go through all the headnotes
19 you're trying to find.

20 MR. SIMMONS: Well, the jury will have to
21 determine damages.

22 Now, the damages model we are using -- we
23 have a couple different damages model, and if you want
24 get into details, ^Ms. Means is much more capable on
25 that.

1 The damages model is based on the use of
2 Westlaw. So the way that we calculate damages doesn't
3 have to be based on how the specific headnotes work,
4 because the point is actual damages are if they did not
13:10:27 5 have this service, then we would have made other sales.
6 That's one damages model. And the other is, if we were
7 going to license someone to do this, they would have had
8 to pay us for each of the cases that they used, and
9 that's another way.

13:10:42 10 So the damages model doesn't have to be,
11 oh, now we have to go back to the headnotes because
12 where the numbers are coming from is LegalEase's use in
13 producing the bulk memos, which we have spreadsheets on
14 from a financial perspective.

13:11:01 15 THE COURT: Right. Except on the direct
16 infringement theory, not -- at the moment, we're not
17 talking about precarious infringement, you know, is it
18 enough that you can say that certain headnotes are
19 infringed because your second model, at least, depends
13:11:15 20 on the number of them that was infringed.

21 MR. SIMMONS: So if our -- so what I
22 would say about that is, from a damages perspective, you
23 can look at actual damages or disgorgement of profits.
24 Disgorgement of profits doesn't -- sorry, actual damages
13:11:31 25 does not turn on how many headnotes are specifically

1 copied. We don't have to get into that detail.

2 But even if you thought we did, then we
3 would just present that to the jury to see the burden
4 and insufficiency of having to decide whether there was
13:11:45 5 direct copying or not. They could focus on the damages
6 question, what do you think the value of the copied
7 material is?

8 THE COURT: All right. Well, we may have
9 to come back around to that. I mean, as a statutory
13:11:56 10 damages model, that would go -- it would depend on the
11 number of copyrighted -- copyrighted individual works I
12 find infringed, but --

13 MR. SIMMONS: Which we have as well.

14 THE COURT: -- I suspect that Mr. Parker
13:12:09 15 is going to have some concerns about this.

16 MR. SIMMONS: Well, I guess to allay
17 those concerns, Your Honor, the only -- no one has moved
18 on damages. So there is no summary judgment motion
19 pending that says we are limited in some way, no Daubert
13:12:25 20 motion on that.

21 So, from where we stand, the motion is,
22 did they directly infringe? The answer is clearly yes.
23 That's the question that's presented by the briefs. If
24 you reach that question, there could subsequent
13:12:38 25 discussion of, okay, now we're in damages land, what do

1 we need to do?

2 But none of that was briefed; no one
3 discussed damages, models, or any of that in the
4 briefing. So it would be inappropriate to deny us
13:12:47 5 what's clearly direct infringement on the basis that,
6 yes, down the line there might be more questions for us.

7 THE COURT: You are quite right, these
8 are separate questions, and that is a question for
9 possible trial, but the Court is also trying to think
13:13:03 10 through what that trial would look like. That is not --
11 I am not going to reason backwards from that to what the
12 summary judgment looks like, but it is something
13 certainly on our radar. Thank you.

14 Mr. Parker.

13:13:28 15 MR. PARKER: If we are going to continue
16 with this, a compilation. Again, these are a little bit
17 like quantum physics, like, these pendulums are both a
18 wave and a particle.

19 But if we're talking about compilations,
13:13:43 20 then these numbers don't work because there is no
21 question -- there is no case that -- I'm sorry, let me
22 say it this way. There's -- every case you have to take
23 a super majority of a compilation in order to be
24 considered to have infringed, and that makes sense in
13:14:00 25 the compilation world.

1 THE COURT: Part of the work? Part of
2 the super majority?

3 MR. PARKER: There is no particular heart
4 -- first, as Patri says, compilations really don't have
13:14:14 5 a heart of the work. And I don't know what the heart of
6 the work is. Each -- as I understand it, each headnote
7 has -- is carefully manicured to a particular case,
8 creative. And so if I remove a -- remove a case and
9 look at the headnote, it doesn't give me insight into
13:14:34 10 all the other headnotes that they have.

11 If I take a portion of their key number
12 system, the whole value of the key number system is how
13 it works all together as a way of organizing. So if I
14 took some of criminal law, some of civil procedure, some
13:14:54 15 of aviation, I don't see how that is part of the case --
16 part of the matter either.

17 I just -- you know, part of the matter,
18 you can go to Harper & Row where they took the words --
19 I think that is the Gerald Ford case. And they took the
13:15:12 20 words of Gerald Ford, and that was sort of the book.
21 That makes sense.

22 But a compilation where you are taking
23 bits and pieces, I just don't -- I know they make the
24 argument, but I don't think they tell you where the
13:15:24 25 heart is. And in a compilation world, I think, as we

1 argue, as we note, the fact that you have to take so
2 much of a compilation actually tells you that you don't
3 really get a heart of a compilation until you get to a
4 very large number, and we just don't have that.

13:15:42 5 THE COURT: By the way, I do want to hear
6 at some point -- you can take it in your order, but
7 somewhere, I want to hear what you think about
8 Dr. Krein's effort to batch these things from the
9 various layers of this spreadsheet. Go whatever way you
13:15:53 10 want.

11 MR. PARKER: Let's start a couple
12 different ways. First of all, I'm going to start here.
13 There is not a single case that allows you to
14 extrapolate at all. The Third Circuit case requires a
13:16:07 15 side-by-side comparison. That's it.

16 And all of the cases that they cite --
17 and the cases are Association of American Medical,
18 page 25 of their motion, is a side-by-side comparison;
19 Texas Holding, LLC, cited on the their reply brief,
13:16:30 20 page 13, side-by-side comparison; plaintiff's reply at
21 14; Peter Pan Fabrics, you will hear about it again when
22 I talk about the next question, side-by-side comparison.
23 And that makes sense.

24 So I will talk about Krein first. We
13:16:52 25 have never had an opportunity to respond to how Krein

1 batches things at all. They didn't move on those Krein
2 numbers at all. So this is the first time we're told,
3 you can just decide how you want to batch it.

4 But those things that Krein responded to
13:17:09 5 or our statements that those headnotes are virtually
6 identical or identical to the words of judicial
7 opinions. And we say, with triviality, you can't just
8 change small things or remove small things. And there
9 has been no analysis done at all about what he considers
13:17:32 10 some addition or some subtractions, that that makes that
11 headnote continue to be copyrightable.

12 THE COURT: Now, Mr. Simmons points out
13 there are 5,000 that you did not claim were trivial.

14 MR. PARKER: I will give you an example:
13:17:49 15 86 of those 5,000, of the cases, don't have headnotes at
16 all.

17 THE COURT: All right. 86 of them don't
18 exist. You have a small batch that were pre-1927.
19 Let's filter those out.

13:18:06 20 MR. PARKER: Because then -- I guess,
21 here is what I'm going to do, I'm going to jump to the
22 best example, it's in their brief, where they give a
23 headnote, a judicial text of a memo question.

24 The headnote text is: "A cause of action
13:18:17 25 accrues to a person when that person comes to a right to

1 bring action," and then it continues.

2 The judicial text is: "A cause of action
3 is said to accrue to any person when that person first
4 comes to a right to bring an action."

13:18:33 5 The memo question is: "Does a cause of
6 action accrue to a person when that person first comes
7 to a right to bring action?"

8 We did not submit that as virtually
9 identical because the headnote continues on past what I
13:18:48 10 read to you, but the portion that is -- appears in the
11 memo, the question raised is, what they have to prove,
12 is, did someone copy from the text of the judicial
13 opinion or the headnote? Because they are almost
14 identical.

13:19:10 15 So that's why those type of things
16 weren't submitted to the Court because that is an
17 analysis, if you do it side-by-side, but it wasn't a
18 virtual identical.

19 Do you see what I'm saying?

13:19:24 20 THE COURT: I do.

21 MR. PARKER: And so there was no
22 admission on our part; we just weren't overly aggressive
23 in submitting to this Court -- we submitted to the Court
24 the things that we could say it is. So word for word is
13:19:36 25 where the headnote is -- conforms to the judicial text.

1 We did that.

2 There are times when the headnote, which
3 we did not bring to -- sorry. There are times we did
4 not bring to this Court's attention where the question
13:19:53 5 actually has nothing to do with either the headnote or
6 the judicial opinion. The words aren't the same. And
7 so we didn't submit that to the Court because that was
8 not the order given to us.

9 That's why you can't just go through the
13:20:10 10 5,000 and then extrapolate, because they came in all
11 different variables, and, as I said, it's -- we are
12 providing you examples, but their obligation is to show
13 copying, and in this instance, there is one example. I
14 don't think that they can show copying, at least that
15 they need to tell the jury that this is copying, and
13:20:27 16 that LegalEase or whomever did not formulate this from
17 the actual words of the judicial opinion.

18 It is their burden to show material
19 misappropriation, and they haven't done it. They're
13:20:46 20 just asking this Court to take 5,000 things and you do
21 the work. That's a jury question.

22 And when we get to the next case, when we
23 talk about 5, those summary judgement cases, what we
24 will call substantial similarity, although you know that
13:21:07 25 we want -- we think it should be virtual identify, but

1 those cases are where the judge is actually doing the
2 side-by-side comparison, and in a fabric case saying,
3 these are identical, or at a Tetris case saying, I'm
4 looking at these two games, and I can't see any
5 difference between the two games.

6 THE COURT: So let me ask the question
7 for you and maybe your ^friends on the other side. I'd
8 like to have -- you know, is there somewhere in the
9 record where I can find the 2,830 headnotes in one
10 column and memo question in the other column, or where I
11 can find the 5,367 that, you know, you didn't claim as
12 ^claim as varying trivially, one column and the other,
13 because I agree with you, the Court ought to review
14 these things individually, and I have not found such a
15 chart, but before granting summary judgement, I would
16 want to go through such a chart.

17 MR. PARKER: I don't mind giving the
18 Court such a chart. For the 16,000 or so with the
19 filtration, we did that work for the Court. Right.
20 Because -- and again, we were conservative.

21 And so it wasn't an admission on our part
22 that there was actual copy. It wasn't an admission --
23 so what is an admission was actual copying because,
24 again, we have instances where headnotes run very long.
25 The judicial opinion has a portion of that headnote, and

1 the question reflects the words of the judicial opinion
2 and not everything.

3 Two, it has to still be protectable
4 elements that are taken. So material misappropriation,
13:22:46 5 that's on them. I am happy to put together a chart as
6 to every single one of these, but that is what's
7 required.

8 You can't just say because you got one,
9 maybe, maybe. No side-by-side comparison at all; none.
13:23:03 10 None.

11 THE COURT: It's a fair point.
12 Responsibility of the Court is to do -- if I take it
13 away from a jury, it requires the Court to do the
14 side-by-side comparison.

13:23:12 15 MR. PARKER: And then, finally, you know,
16 a lot of work, we talk about Barb Frederiksen-Cross.
17 That work was done before we knew exactly what headnotes
18 were involved in this case. It was an algorithmic and
19 mechanical comparison.

13:23:26 20 But anyway, you can't rely on Krein's
21 view of what he thinks is substantially similar at all.
22 It's not his province.

23 You can't rely on Barb, which he may or
24 may not think -- it's not their province. That is a
13:23:41 25 factfinders province in the rare instances where it is

1 -- copyright infringement is granted on summary
2 judgement. It is still a judge looking at it, making
3 these determinations, not some expert that is outside
4 the bounds. And we cite the cases that say that in our
13:24:03 5 opposition -- oh, and damages.

6 So I'm not familiar with that engineering
7 case, 785 F.7. I just read it. I don't see how it gets
8 you to you can find one and then what we are going to do
9 for the damages is run through and say -- and
13:24:24 10 extrapolate out.

11 As these cases indicate, used compare
12 side by side, the works that are claimed to be
13 infringed, you don't find -- not horseshoes and hand
14 grenades.

13:24:38 15 THE COURT: I get the theory that if they
16 can show a large enough number that would cause a drop
17 in subscriptions. Subscription revenue could be
18 independent -- not a linear relationship with the
19 headnotes. It's like a threshold. I also get the
13:24:55 20 disgorgement of profits theory.

21 My issue was, well, what if it's not one
22 of those two? If I look at some other things and those
23 other models seem to have some kind of correlation where
24 there is a certain value for headnote -- maybe I have to
13:25:10 25 do a median or an aggregate or something, but you still

1 would need to know the number of headnotes infringed.

2 MR. PARKER: Right. The of it is the
3 crate to actually establish or challenge
4 non-infringement. Because we sit there at a jury trial,
13:25:23 5 you say I found one --

6 THE COURT: Well, no. If they were going
7 to do that, you would have a right to challenge
8 infringement on the other headnotes. That, I get. Now,
9 if they have a volume independent theory of the damages
13:25:36 10 that is a disgorgement theory or is a here is how many
11 subscribers you lose once there is a -- you hit some
12 threshold of you've got to use -- you know, you no
13 longer have to use Westlaw, so subscribers switch. You
14 could, in theory, come up with damages models that don't
15 have a linear relationship.
13:25:55

16 MR. PARKER: Their damages aren't
17 tailored that way. They depend on everything that they
18 establish has been infringed.

19 So if you found five headnotes, their
13:26:07 20 damages model does not allow you to modify it down.
21 They do not have any model that says X number
22 infringements equals this diminution in customers. They
23 don't have that.

24 THE COURT: How about the disgorgement
13:26:31 25 that Mr. Simmons referred to?

1 MR. PARKER: Well, the disgorgement is
2 entirety. So for example, if you said five headnotes
3 out of the 21,000 -- let's just posit that -- no key
4 numbers compilation, none of that five headnotes. Right
13:26:45 5 now they are asking us to disgorge everything. Right?
6 Their damages model is not dependent - is not formulated
7 to say if it's X number of headnotes, then Y. It's,
8 again, premised on all of them are infringed. But
9 that's what it is.

13:27:07 10 In any case, we --

11 THE COURT: It wouldn't be a barrier for
12 summary judgement. It would just mean a trial that
13 would not just be pure damages but require liability
14 findings on a whole bunch of other headnotes.

13:27:25 15 MR. PARKER: No, it would require trial
16 on every other piece of their copyright, that's what it
17 would require. It would not be a damage -- I mean,
18 granting summary judgement on what they've given you to
19 do, you can't. But it would not be a trial on damages,
13:27:43 20 it would be an infringement trial.

21 Granting summary judgement on the five
22 doesn't save anybody any work and they haven't done what
23 they need to do to get the Court to that place. Now, if
24 the Court orders us to create a chart, put it together,
13:27:58 25 happy to. But that's -- that is what needs to be done.

1 Not this and not telling me that Dr. Krein, who got to
2 do a late report, which we don't get to respond to, is
3 now in play, so that we're now talking about 21,000
4 headnotes. I mean, I thought we were just talking about
13:28:16 5 5,000. And again, 1,000 of those headnotes were never
6 accused in this case.

7 THE COURT: All right. You have a
8 procedural objection on that. What if I gave you notice
9 and opportunity to be heard and the Court brings those
13:28:29 10 up sua sponte? Like, I will give with you another
11 14 days if you want to --

12 MR. PARKER: I am actually saying
13 something a little bit more than that. One,
14 procedurally, it's done. But two, you still need a
13:28:43 15 side-by-side -- to give me 14 days on those doesn't
16 answer any of the questions I've posed as to the entire
17 lot.

18 THE COURT: Right. Fair enough.

19 MR. PARKER: Thank you.

13:28:53 20 THE COURT: I will give Mr. Simmons a
21 chance to respond.

22 MR. SIMMONS: Your Honor, the answer is
23 no, no, no, no no. That is a completely backwards way
24 of looking at what happened here.

13:29:30 25 So first, let me start with the

1 side-by-side comparison. Because I have those, they are
2 in the record, and they are available to everybody who
3 wants them. The 5,000 headnotes are D.I. 678-27.

4 THE COURT: That's the 5,367?

13:29:50 5 MR. SIMMONS: Yes.

6 THE COURT: 678-27.

7 MR. SIMMONS: The 2,830 are D.I. 67821.

8 THE COURT: 21. That's the 2,830 that
9 Barbara Frederiksen-Cross --

13:29:58 10 MR. SIMMONS: Correct.

11 THE COURT: I was told algorithmically
12 could not say or could not deny were at least as close
13 or almost identical to the headnotes that weren't
14 verbatim --

13:30:17 15 MR. SIMMONS: That's right. She had a
16 methodology by which she was determining what was too
17 close to an opinion and too close to a question.

18 THE COURT: Are these two column charts
19 side-by-side?

13:30:27 20 MR. SIMMONS: I believe that they are,
21 but I'd have to go back and check.

22 THE COURT: The other thing that would be
23 helpful is I don't know whether it would be necessary to
24 also look at the opinion as a whole. Is the name of the
13:30:36 25 opinion in there, hyperlinked, anything like that?

1 MR. SIMMONS: I know some of the charts
2 do have that. I can't remember if those two do.

3 The last chart I'd give you is also one I
4 mentioned earlier at 690, 6 to 11. That is the Krein
13:30:48 5 Appendix B, which is the most robust. It has every
6 single thing you could possibly want in it. But I do
7 know that in Krein, Appendix D, from his rebuttal
8 report, which I do not have the D.I. number for but I
9 can find, that does have the judicial opinions,
10 everything you need to find that. So that's in the
11 record, I just don't have the D.I. in front of me.

12 THE COURT: All right. But there is one
13 that has the side-by-side for headnote question and
14 entire opinion.

13:31:14 15 MR. SIMMONS: At least the quoted
16 judicial opinion text.

17 THE COURT: The passage?

18 MR. SIMMONS: The passage. And that is
19 Appendix B to Krein's supplemental report.

13:31:23 20 THE COURT: Appendix --

21 MR. SIMMONS: B.

22 THE COURT: I thought B was 690, 6
23 through 11.

24 MR. SIMMONS: Yes, that's B. And that
13:31:29 25 one has everything at the most robust. All I was saying

1 is that Appendix D to his rebuttal, which I don't have
2 the D.I. for, has I know the specific cases cited, if
3 you want to to go back to the judicial opinion and --

4 THE COURT: I see. Put B and D together.

13:31:46 5 MR. SIMMONS: No, you could do it all
6 with B. I'm just saying there's another one out there
7 if you wanted to go all the way back to judicial
8 opinion.

9 THE COURT: Okay. Got it.

13:31:49 10 MR. SIMMONS: I don't think you need to
11 do that.

12 Number two, they got the chance to
13 respond to Appendix B. The Canter declaration that I
14 just discussed at 717 is specifically their response to
15 that. It is not a situation where they didn't get an
16 opportunity to respond.

17 And by the way, they shouldn't get a
18 chance to redo it now. Procedurally, that would be a
19 prejudice to us because we've now gone through all of
13:32:14 20 summary judgement, we've gone -- we actually almost went
21 to trial on the basis of them being ordered to tell you
22 what was quoting from a judicial opinion or varying from
23 it. They got their shot. They got another shot in the
24 Canter declaration, and even then there's 4,000
13:32:28 25 headnotes in there.

1 So we should not go back, that would be
2 itself a procedural prejudice on us. We are entitled at
3 this point to say the record is closed, they didn't do
4 what they had to do.

13:32:41 5 THE COURT: Where is this 4,000 number
6 coming from?

7 MR. SIMMONS: So the Canter declaration,
8 which again is 717, takes the 5,000 number that we were
9 discussing -- and it's in Jonathan Krein's Appendix B,
13:32:54 10 which is what's cited in the declaration, and then says,
11 oh, there is a thousand other things that we think
12 should come out for one reason or another. You subtract
13 1,000 from 5,000, you get the 4,000.

14 THE COURT: Does that take out the ones
13:33:08 15 they say headnotes that don't exist, headnotes that are
16 pre 1927 and copyrightable opinion, et cetera?

17 MR. SIMMONS: Yes. So it says, do not
18 exist in judicial opinion, predates, verbatim copies,
19 near verbatim, no copying, minimum questions with
13:33:23 20 minimum overlap, no previously identified -- the whole
21 list, you know, we can disagree with that, but for
22 summary judgement -- like, you know, giving them the
23 benefit of the doubt of the attorney declaration they
24 put in, that only gets you 1,161. That leaves me 4,000
13:33:41 25 headnotes that we seem to all agree, and having had the

1 benefit of putting in an attorney declaration explaining
2 why, they couldn't say we're not protectable.

3 THE COURT: Okay. And is there a
4 side-by-side chart for those or it's just a subset of
13:33:53 5 5,367?

6 MR. SIMMONS: That has charts in it as
7 well.

8 THE COURT: Okay. But Canter
9 declaration, 717?

10 MR. SIMMONS: Yeah. What I don't recall
11 is whether the ones -- that has the ones that they are
12 saying are out, referring back to Appendix B, so you
13 would have to cross-list. But the point is, they only
14 remove that 1,000, there's 4,000 left.

15 THE COURT: Even if we go through the
16 5,367 and strike out the 1,161 that Canter --

17 MR. SIMMONS: Correct.

18 THE COURT: Got it.

19 MR. SIMMONS: Next I want to point out --

13:34:19 20 and I was wondering whether this would come up -- it is
21 the burden question on substantial similarity. It is
22 not our burden, it is their burden. We, as the
23 copyright owner, said, here is what we think was copied
24 and we gave you a chart. That then turns to them to say
13:34:36 25 why they think it's not protectable, which the

1 filtration briefing was a good way of doing -- turned
2 out to be a good way of doing that. But I could give
3 you citations for that. First --

4 THE COURT: But I think their point is
13:34:45 5 because the copying -- it's clear that there was copying
6 to the deletes, but the evidence of actual copying here
7 is that this is so close, so you've got to show that
8 this was copied.

9 MR. SIMMONS: So two things there.

13:35:10 10 Actual copying, under Skidmore versus
11 Led Zeppelin, which is a Ninth Circuit opinion, says
12 that: "Actual copy with probative similarity" -- are
13 you looking at it there? -- "is protectable and
14 unprotectable elements."

13:35:25 15 It doesn't matter for purposes of actual
16 copying any of the filtration. They don't get to do any
17 of that at the actual copying step. It's irrelevant.

18 And when we get to six, I will tell you
19 that again, because that is a key way of making it easy
13:35:39 20 for the Court on actual copying.

21 We all agree that there is a lot of
22 similarity there. We are done on actual copying. The
23 only place filtration comes in is at substantive
24 similarity after the fact, and that is their burden.

13:35:51 25 We have that burden because of the

1 statute 17 U.S.C. 410(c). We get a presumption of
2 validity; they have to come back and say why it's not
3 valid. The legislative history says the same.

4 And then there are cases in every circuit
13:36:05 5 I could find. The one I liked the best is Compulife
6 Software versus Newman. That's 959 F.3d 1288 at 1305 to
7 1306. That is the Eleventh Circuit, where it says:
8 "Copyright owner says what was copied. The defendant
9 says here's why it's unprotectable," and then it shifts
13:36:25 10 back.

11 So here we said it was copied, they put
12 full in a filtration brief or whatever, and that's it.
13 If they don't say something is unprotectable, we move
14 past protection and we just say it's infringement.

13:36:37 15 Other cases, should you want them,
16 invoicing the bank, that's Boissin v. Banion; that's
17 273 F.3d 262 at 269, Second Circuit. Same thing: The
18 Court says, You have a certificate. It gives you a
19 presumption of validity, so the defendant's burden is to
13:36:52 20 come forward.

21 Brocade versus A10 at 2011 Westlaw
22 7563043 at 2.

23 Society of Holy Transfiguration Monastery
24 versus Gregory. That is the First Circuit, 689 F.3d 29
13:37:04 25 at 52.

1 So it's not our burden once we get
2 substantial similarity. So just -- I want to make sure
3 we are all working from the same legal test.

4 In terms of the quote from the brief that
13:37:22 5 my friend on the other side was quoting from, remember,
6 in our reply we showed that actually they had truncated
7 the judicial opinion and that, in fact, the West
8 headnote is different than what they say.

9 Again, the headnotes themselves supersede
13:37:35 10 all of this because there is not any testimony that
11 changes them. All of this is just looking at them. So
12 the Court can look at Appendix B to the Krein
13 declaration and say, Yeah, this is similar, this is not
14 similar, and decide it. There is not any factual
15 dispute. It's just do you agree that legally
13:37:50 16 truncating, reversing order, is protectable, and that
17 decides the issue.

18 THE COURT: But ultimately you're not
19 taking issue with Mr. Parker's point that the Court
13:38:06 20 needs to go through each of these notes.

21 MR. SIMMONS: Well, I think the Court can
22 use -- we said this -- the Krein declaration. He is not
23 opining on substantial similarity; he's categorizing the
24 differences between them.

13:38:18 25 So you can go and pull those out. But

1 our point is no one has debated the categories. Even in
2 the Canter declaration, Dr. Krein's supplemental report,
3 they don't say he miscategorized things. They just say
4 here are some other things we want to pull out. So if
13:38:36 5 you take the categories, again, it's fine to
6 extrapolate.

7 The last thing I want to talk about is
8 the damages model again. I would recommend to the Court
9 that it should not reach it because that's not what the
13:38:48 10 parties briefed, but in looking ahead, a couple things.
11 On discouragement, our only burden under the statute,
12 504(b), is to prove their revenues, then they do
13 expenses and apportionments. So that is not my burden
14 to do any of that work. That does not turn this into an
13:39:04 15 infringement case.

16 Two, on actual damages, as I mentioned
17 and was confirmed for me at the break, the actual
18 damages model does not turn on which headnotes are not
19 taken. The actual damages model is based on the harm
13:39:20 20 and loss to profits Westlaw suffered from the ROSS bulk
21 memo project. That is an actual damages calculation
22 based on fees that weren't paid to Westlaw. That is
23 something that would be proved up at trial.

24 THE COURT: But the threshold then is
13:39:35 25 just more than de minimus?

1 MR. SIMMONS: Yes. They copied. They
2 created a bulk memo project and infringing -- we argue
3 an infringing platform. And the question is, what are
4 the damages that resulted from that? And our damages
13:39:50 5 expert and technical estimates would say, yeah, once you
6 didn't pay us the fees that you normally would pay, we
7 should have gotten that money. And yeah, there would be
8 a trial and the jury would have to reach a conclusion
9 about that for sure, but that doesn't change this into a
13:40:07 10 mini trial on infringement.

11 You would come in and say to the jurors,
12 I found that there was infringement. You can even say,
13 you know, it's not all of Westlaw, but there was
14 infringement here. And then our burden is to prove
13:40:18 15 actual damages; their burden is to prove deductions on
16 disgorgement or we could just seek statutory damages,
17 and then the jury decides.

18 It doesn't have to be -- you know, there
19 are burdens there, we will have to prove things, but we
13:40:31 20 can make easier for them by taking the direct
21 infringement question off the table and then just having
22 the experts go at it.

23 THE COURT: Talk a little more about how
24 I am supposed to figure out what is more than de minimus
13:40:44 25 here.

1 MR. SIMMONS: We are talking about
2 thousands of headnotes that are long sentences. In
3 Harper & Row, which my friend on the other side
4 mentioned, it was like 300 words, so I think we're well
13:40:55 5 past that threshold. So I don't think it requires a
6 significant debate about what de minimus would be.

7 If we were talking about a sentence,
8 which is where that line often is, like if you just took
9 a sentence out of a book, maybe there is a debate of is
13:41:14 10 that di minimus copying. Thousands of sentences has
11 never been de minimus and no one has ever suggested
12 that.

13 THE COURT: So if I thought that the way
14 in which I find that something is more than de minimus
13:41:30 15 has an influence on a damages model, right, that -- a
16 model of reduced subscriber revenue would involve taking
17 enough stuff that people feel like they can migrate to a
18 header, that might -- is that something I would need to
19 make a finding of at this stage?

13:41:50 20 MR. SIMMONS: No. First of all, you
21 wouldn't make a finding because it wasn't raised in the
22 briefing.

23 Second of all, damages is one of those
24 areas that is quintessentially fact bound and you don't
13:42:00 25 always give them to the jury. So Your Honor should

1 instruct the jury that to prove actual damages, we are
2 required to show the but-for world that causes the
3 damages model, and then the jury decides whether they
4 think that's right or not.

13:42:13 5 My friends on the other side will say,
6 no, that couldn't possibly be. We will say yes. And
7 that is a quintessential jury question. Then the debate
8 between the two experts on damages, that happens in
9 every IP case and I don't think it's particularly
13:42:29 10 burdensome for the jury to listen to them and decide
11 based on cross-examination and credibility, whether they
12 think it's credible or not.

13 THE COURT: Just a moment.

14 (Brief pause.)

13:42:36 15 MR. SIMMONS: I suspect we're talking
16 about the same thing. We found Appendix D. It's D.I.
17 678-27. So that's the other spreadsheet with all the
18 case numbers.

19 THE COURT: Right. Okay. So I looked at
13:44:05 20 678-21, the 2830 that we were just looking at. That
21 looks satisfactory.

22 Let me just pull up 678-27 and just
23 confirm whether that has, you know, enough. If it has
24 the same columns and the same information, that will be
13:44:19 25 sufficient for the Court.

1 (Brief pause.)

2 THE COURT: At the moment -- I mean, it's
3 -- look at the charts. If the Court wants some further
4 charts or adding additional columns of the charts,
13:46:16 5 I'll...

6 MR. SIMMONS: Thank you, Your Honor.
7 Would you like us to proceed to Question 5?

8 THE COURT: No. I wanted to give Mr.
9 Parker the last word.

13:46:24 10 MR. SIMMONS: Okay.

11 MR. PARKER: A few different things.

12 First of all, Krein exhibit, Appendix B,
13 we have not had an opportunity to respond to that. That
14 was submitted in response to the filtration hearing. It
15 is not moved for -- the next Krein, Exhibit D, does not
16 have anything about judicial opinions in there at all
17 and we would need that opportunity to add those. They
18 have the burden of showing that we copied from the
19 headnotes. They can't just say the headnote in the
13:46:43 20 question looks similar. We've shown you an example of
21 where the judicial opinion itself uses the words.

22 THE COURT: Right. This is the thing
23 that I noticed just now in reviewing them. D.I. 678-21
24 is the 2830 and that does have headnote, memo question,
13:47:00 25 section of payment. And you're saying that if I were to
13:47:19

1 use Appendix D, 678-27, you would also want to have the
2 column in that - an additional column with a citation to
3 an opinion, but it should have the actual passage from
4 the opinion that allows me to see how each of those two
5 selections relates to the piece of text.

6 MR. PARKER: Yes.

7 THE COURT: Yes, I understand.

8 MR. PARKER: Oh, I know. One last thing.
9 De minimus copying. Citing to Harper & Row does not
10 help you. Harper & Row is the heart of the matter case.
11 So you can't say 33 -- the amount that was copied in
12 Harper & Row somehow could inform this decision. There
13 are 28 million headnotes. 28 million. To say that
14 5,000 is the heart of the matter --

15 THE COURT: Well -- okay.

16 MR. PARKER: There is not a case that
17 they cite that gives you guidance as to what is enough
18 in a context like this where a headnote from -- one
19 headnote from a case, that wouldn't apply to another
20 case, is somehow enough if we're talking about the
21 words.

22 If we're talking about headnotes, how
23 they fit in the compilation because they're connected,
24 that is a compilation. We know you have to get a lot
25 more than some one percent of all the headnotes in that

1 sense.

2 So I am just cautioning the Court. Like,
3 Harper & Row is a book where they quoted the best thing
4 out of the book, right? And in the book it's different,
13:48:54 5 but it's the best thing out of the book. And it was an
6 unpublished manuscript. But the best thing, they're
7 like, who is going to want to read that now? They just
8 don't have that where because there are 5,000 headnotes,
9 suddenly no one wants to use Westlaw. They just don't
13:49:12 10 have that at all.

11 THE COURT: Okay. Very good.

12 Question 5: The circumstances under
13 which it is appropriate for the judge to resolve
14 substantial similarity at summary judgement rather than
13:49:25 15 leave it to a jury, and I wanted specific citations to
16 case law.

17 MR. SIMMONS: Your Honor, courts
18 routinely find that two works are substantially similar
19 without requiring a jury. Just the level set. As with
13:49:42 20 other issues that are presented for summary judgement,
21 the question is whether there are genuine disputes as to
22 material facts. When the facts are not disputed, just
23 the legal interpretations of them, summary judgement is
24 appropriate.

13:49:53 25 So for example, in TD Bank vs. Hill, the

1 Third Circuit held that the district court correctly
2 granted summary judgement on copyright infringement.
3 That's 928 F.3d 259, 277. Neither the Third Circuit nor
4 the district court that affirmed applied special
13:50:12 5 standard. Instead, the courts considered the
6 defendant's arguments that --

7 (Court reporter interruption.)

8 MR. SIMMONS: I'm sorry.

9 The Court considered the defendant's
13:50:24 10 arguments that the material they copied was
11 unprotectable under the merger or set of fair doctrines.
12 And because there were numerous ways to express the life
13 story and business philosophy at issue, they did not
14 apply. Thus, the copied material was protectable and
13:50:39 15 summary judgement was appropriate. That's at 278.

16 The same thing happened in a case Ms.
17 Cendali and I had in the District of New Jersey. That
18 is in Tetris versus Xio Interactive. The Court
19 considered the defendant's arguments for holding that
13:50:53 20 the copy material from Tetris, the video game, was
21 unprotectable under the idea, merger, Santa Fer, game
22 mechanics doctrines. It filtered out the unprotectable
23 material and then compared what remained. And as they
24 were substantially similar, the Court granted summary
13:51:09 25 judgment. That's 863 F. Supp. 2d 394, starting at 408.

1 And that's true cross the country.

2 In the First Circuit, courts affirmed
3 grants of summary judgement in Society of The Holy
4 Transfiguration Monastery vs. Rayon(sic), that's 689
13:51:28 5 F.3d 29; TMTV vs. Mass Productions, 645 F.3d 464; and
6 Segrets vs. Gillman Knitwear, 207 F.3d 56, in all of
7 those cases rejecting the defendant's unprotectability
8 arguments and finding that works had differences that
9 would be overlooked were not significant.

13:51:51 10 In the Second Circuit, summary judgement
11 was affirmed in Castle Rock Entertainment vs. Carol
12 Publishing Group.

13 (Court reporter interruption.)

14 MR. SIMMONS: I'm sorry.

13:52:03 15 That's 150 F.3d 132; Lipton vs. Nature,
16 71 F.3d 464; and Twin Peaks vs. Nations
17 Publication(Sic), 996 F.2d 1366.

18 In the Seventh Circuit, it's GCW(Sic)
19 Investments vs. Novelty, that's 482 F.3d 910.

13:52:25 20 And in the Ninth Circuit, it's Unicolors
21 vs. Urban Outfitters, 853 F.3d 980. Those are just
22 appellate decisions. There are, of course, numerous
23 district courts that view the same way.

24 Here, Thomson Reuters moved for summary
13:52:41 25 judgement, and ROSS has not established that there was a

1 genuine dispute about its defenses because of the
2 un rebutted testimony of Thomson Reuters' attorney
3 editors on the various points of judgment and creativity
4 involved in creating the copied material -- that is in
13:52:55 5 Oliver declaration that we keep discussing -- or the
6 unlimited choices availability to them, as ROSS's own
7 expert, Dr. Lighter, we discussed earlier, admitted in
8 his deposition. And it's discussed in our opening brief
9 at pages 22 to 24.

13:53:15 10 And what he pointed out specifically was
11 that many different legal research platforms have no
12 headnotes, their own headnotes, a different number,
13 different wording of them. And given that the Court
14 need only apply the law to the undisputed facts, there
13:53:33 15 is another -- this is another case where summary
16 judgement is appropriate given the close relationship
17 between the headnotes and the memo questions that copied
18 them.

19 THE COURT: A few questions. So ROSS's
13:53:45 20 position in its opening brief was expert testimony is
21 irrelevant to decide a substantial similarity. You, in
22 your opening brief, disagreed.

23 What's the correct interplay of the
24 opinion of experts and those of lay observers like
13:54:00 25 jurors.

1 MR. SIMMONS: So I will give you the
2 expert and lay -- I'd also like to include the Court in
3 that because all three of them can be involved.

4 So at the actual copying stage, everyone
13:54:11 5 agrees experts are involved. At substantial similarity,
6 there are cases where courts have said this is complex,
7 we want to have experts involved. The classic example
8 is computer programs, but there is no reason to believe
9 that's restricted to them because of the nature of the
13:54:28 10 computer program, it's because the judge or the lay
11 observer would need help collecting all the material
12 together.

13 To be clear, as I said before, our
14 experts are not doing the substantial similarity
13:54:43 15 analyst. What they're doing is showing here is what all
16 the things are in these categories factually what's
17 going on, and then it's for the fact finder to decide.

18 What the jury or judge can then do is
19 say, are these substantially similar? Basically you as
13:54:59 20 Your Honor could do, like all these other cases, is say,
21 okay, ROSS's burden was to say what was unprotectable,
22 they didn't do that for these; or I disagree with their
23 position on merger or summary fares as a legal matter,
24 the rest is in; and look at them, they look similar
13:55:17 25 enough, direct infringement.

1 THE COURT: So a lot of cases like
2 Tanksley say substantial similarity, it's usually an
3 extremely close question of fact, that's why summary
4 judgement has been traditionally disfavored in the
13:55:32 5 copyright.

6 Why isn't there a close factual question
7 here?

8 MR. SIMMONS: So that's interesting. So
9 that quote comes from I think -- the earliest case I
13:55:41 10 remember is Arnold versus Porter from the 1940s. I
11 actually think the courts have moved quite a pace from
12 that understanding. They don't just deal with
13 substantial similarity at summary judgement. They're
14 not doing it motions to dismiss stage where courts will
13:55:55 15 actually say the works are in front of me, I can decide
16 that and I will make a determination. The Peter F.
17 Geiger case I mentioned earlier from the Second Circuit
18 was sort of a big decision in that area where they said
19 I can do this, I can do substantial similarity without
13:56:10 20 any discovery, without any facts.

21 Here, the reason you can do it is we
22 don't have the kind of testimony of the curettage in
23 dispute. So for example, you can imagine a case where
24 whether or not something is a common trope of a book of
13:56:25 25 fiction -- and I'm saying that that was copied -- is

1 debated. But there is two experts or two people saying,
2 no, it is a trope; no, it's not a trope. That is not
3 ROSS's argument.

4 ROSS's argument here is these are too
13:56:38 5 close to the judicial opinions. But we have the
6 judicial opinions, we have the headnotes, and we have
7 the quotes. There is no disputed issue of fact on that,
8 so the Court can easily look at them and decide for
9 itself.

13:56:49 10 THE COURT: Okay. Walk me through
11 substantial similarity for the key number system.

12 MR. SIMMONS: The key number system works
13 the same way as the other parts of the analysis work.
14 The question is, what was original to us? Here, our
13:57:08 15 point is it's the whole thing, it is a textonomy, but
16 it's also made up of all of these parts.

17 They, in creating their bulk memos, named
18 every single bulk memo after the key number system. So
19 like, everyone would have our numerical thresholds in
13:57:22 20 them. And then, of course, as the headnotes were
21 created, what they were doing was marching through that
22 process. There is no question that that was copying
23 there. I think the headnotes are the easier thing to
24 sort of seek through text, but it's clear the key number
13:57:39 25 system was copied as well.

1 THE COURT: So ROSS says procedurally you
2 didn't raise 1,623 of the 2,830 from Frederiksen-Cross.
3 What is your response?

4 MR. SIMMONS: We did. But also,
13:57:56 5 remember, we had a lot more submissions since the
6 original raising of this, so there were -- a filtration
7 hearing, there was supplemental Krein declaration. So
8 again, I go back to what I think what the Court should
9 do is look at Appendix B to the supplemental Krein
13:58:13 10 declaration where it has the judicial opinion text, the
11 headnote, the question. That's all Your Honor needs to
12 do. They tried to filter that out of the Canter
13 declaration, they didn't filter it all out, we win.

14 THE COURT: So take the 2,830 in Krein
13:58:33 15 Appendix B, which I guess is 678-21. At most, filter
16 out the 1,161 from the Canter declaration. And what's
17 left, there is infringement at least as to that.

18 MR. SIMMONS: As we discussed earlier, I
19 have a thousand of headnotes in every single way we
13:58:49 20 cross this bridge because there's so much copying. I
21 don't think Your Honor needs to go through every single
22 thing to get there, you just have to say that there's
23 more than de minimus copying and let's move on to the
24 other parts of the case.

13:59:01 25 THE COURT: Okay.

1 MR. PARKER: At the heart, this isn't
2 really an argument about whether you can grant summary
3 judgement or not. Right? Unicolor tells you that
4 granting summary judgement for infringement in favor of
13:59:26 5 a plaintiff is the exceptional circumstance. Nimmer
6 tells you at Section 12.10 that if the resemblance is
7 overwhelming, you should grant summary judgement. In
8 footnote 76, notes that it rarely happens in favor of
9 plaintiff and usually on substantial similarity it's
13:59:49 10 been in favor of the defendant.

11 And in each of the cases that were cited,
12 the correlation was obvious. So TD Bank copied 16
13 percent, side-by-side comparison in Unicolors. So
14 overwhelmingly identical fabric designs. Range Rd.
14:00:13 15 Music, the entire song was played. It wasn't a matter
16 of parsing anything. Association of American Medical, a
17 side-by-side comparison was done by the court. The
18 original aspects of the MCAT had been improperly
19 appropriated. Side-by-side comparison, the court said
14:00:31 20 there was no difference. So we are not at that stage.

21 We are at a stage, though, where --
22 again, I will say it again, we would like to respond to
23 the Krein supplemental. But moreover, this case also
24 raises the issue of copying, and that's the example we
14:00:52 25 talked about last time.

1 It's not merely whether some aspect of a
2 headnote is created. The headnotes are, based on
3 judicial opinions.

4 I want to make sure I didn't hear
14:01:09 5 something wrong. There are some memos that have a legal
6 -- in the metadata, have a legal phase. They call that
7 their key number system. It doesn't have a key number.
8 And key numbers aren't obvious from any of the bulk
9 memo. Not even every bulk memo had such a thing.

14:01:37 10 A small amount of the 25,000 -- it's in
11 our brief. I want to say a thousand, I just don't want
12 to get caught by saying I am diminishing it overly much.
13 I just don't -- but those memos don't actually have a
14 time in any obvious way. Most of them, with anything,
14:01:55 15 that would be the key number system, not that ROSS would
16 have received.

17 So it's a false statement to say that
18 these memos contain reference to key number systems. In
19 the metadata itself -- not even when you read the memo,
14:02:10 20 in the metadata, there is a reference to an area of law.
21 For now they want to call that a key number system. I
22 think that is a fair question if the Court does not --
23 the Court is -- whether that is actually the key number
24 system and my guys considered the key number system and
14:02:27 25 whether they actually had anything to do with that at

1 all, I think that is a question for the jury.

2 So we can talk until we're blue in the
3 face about whether or not you can grant summary
4 judgement. Of course you can in the right case.

14:02:42 5 THE COURT: So talk about the interplay
6 from the observer. Isn't this fundamentally the
7 judgement call about how much they look alike? We are
8 not talking about computer code here. Mr. Simmons makes
9 a fair point.

14:02:52 10 Isn't that a factual determination where
11 when it's close the jury makes it, when it's clear to
12 the naked eye of the judge, the judge can make it?

13 MR. PARKER: Oh, yeah. Listen, I'm
14 saying our expert -- neither expert is a legal expert in
14:03:08 15 any way, shape or form. You can tell whether something
16 is a trivial -- when it says Rule 54(b) and the headnote
17 says a motion under Rule 54. Or if the Court says in a
18 12(b)(6) motion, and the headnote says in a motion to
19 dismiss. You are better equipped to tell me if that is
14:03:33 20 similar or a trivial variation than Dr. Krein is and
21 certainly Dr. Frederiksen-Cross, who didn't look at it
22 at that level.

23 So it is unavoidable that you're going to
24 look at it if you want to, right? And I think you're
14:03:51 25 given the opportunity to do that, frankly, under the

1 case law. We just want you equipped with the right
2 things to do so.

3 THE COURT: Fair.

4 Now, Ms. Frederiksen-Cross, your expert,
14:04:07 5 describes 2,830 of the headnotes. Is that a concession
6 on substantial similarity?

7 MR. PARKER: No.

8 THE COURT: Why shouldn't I treat it that
9 way?

14:04:14 10 MR. PARKER: Because you have to look at
11 the actual words used and what portion was used. Again,
12 we are going back to -- she's just mentioned how many
13 words are similar. So the example on page 2 of -- in
14 their brief but on page 2, if you did that comparison,
14:04:28 15 there are more words that are dissimilar than are
16 similar. But the words that were actually made into the
17 question also appear in the judicial text. It is not an
18 admission of anything. And it is a substantial
19 similarity of why. And I think that's -- what portion
14:04:48 20 of the headnote, like where, what are we talking about?

21 She doesn't get you to that. And then
22 what was actually copied, she doesn't get you there
23 either.

24 THE COURT: All right. Mr. Simmons.

14:05:10 25 MR. SIMMONS: So on the question of how

1 close they have to be, I commend to the Court Castle
2 Rock, which is one of the cases I mentioned. That is
3 the Seinfeld Aptitude Test case. There wasn't even
4 side-by-side comparison there. Those are a TV show and
14:05:26 5 a quiz book that had only 643 fragments, is the way that
6 the court describes what was copying, and says that's
7 more than de minimus and found and affirmed substantial
8 similarity by the district court, finding it on summary
9 judgment. So you don't have to do a whole lot of work
14:05:44 10 to make this happen.

11 Secondly, you have to really be careful
12 about when we are talking about actual copying or we're
13 talking about substantial similarity. Actual copying,
14 as I said, we don't do any of the filtration analysis.
14:05:58 15 I'll come back to that --

16 THE COURT: We had that last time and I
17 haven't heard Mr. Parker to dispute that we can look at
18 the whole thing of actual copying, substantial
19 similarity is where we filter.

14:06:03 20 MR. SIMMONS: Correct. And so in the
21 substantial similarity step, we said here is what was
22 copied; they're supposed to say what they think was
23 unprotectable, and then we respond. That's happened
24 multiple times. Ms. Frederiksen-Cross, they chose to
14:06:19 25 have an expert come up and do that analysis.

1 Do I agree with how she did it? No.

2 That is their expert. But she leaves on the table
3 thousands of headnotes even using the analysis they
4 chose to use. That's why it's relevant for summary
14:06:31 5 judgement, because even if we accept their version of
6 the facts, then we still win.

7 Even if you thought, though, it is an
8 expert, I'm concerned about that, what you can do is
9 look at the chart of what she did and look for yourself
14:06:47 10 at how similar and different things are, and you can do
11 that comparison that way too. I'm happy to win in any
12 way you want to, to do it, as long as I win.

13 THE COURT: And you don't have a problem
14 with taking the 1,161 from Canter, do I subtract those
14:07:01 15 from the 2,830 and Frederiksen-Cross?

16 MR. SIMMONS: So those were already out.
17 So --

18 THE COURT: If there is any disagreement,
19 I want to know about it. But the 1,161 is a subset of
14:07:13 20 5,367, but it's not a subset of the 2,830?

21 MR. SIMMONS: Right. So 2,830 is here is
22 Frederiksen-Cross's analysis where I walked her through
23 and said, okay, well, if we accept it, how does this
24 work out --

14:07:24 25 THE COURT: So the 1,161 had already

1 been --

2 MR. SIMMONS: It is a response to our
3 Krein Appendix B. So their version is
4 Frederiksen-Cross, I then said, okay, at her deposition,
14:07:38 5 walk we me through your analysis --

6 THE COURT: Took her on her own terms on
7 the --

8 MR. SIMMONS: Correct. And that gets you
9 to a thousand.

14:07:45 10 During the Daubert point -- remember
11 Frederiksen-Cross had essentially a sur-rebuttal,
12 Your Honor permitted it but let us have a supplement in
13 response to it. The supplemental Dr. Krein report
14 contains Appendix B, which as I said, is I think the
14:08:03 15 best way of looking at this because it has the judicial
16 opinions, the headnotes, and quotes, and the
17 categorization. The Canter declaration at summary
18 judgement then responds to that, and that's where the
19 thousand is coming out of.

14:08:12 20 THE COURT: The thousand is coming out
21 of --

22 MR. SIMMONS: Appendix B.

23 THE COURT: I thought Appendix B was the
24 2,830.

14:08:36 25 MR. SIMMONS: No.

1 THE COURT: The Appendix B is the 5,367?

2 MR. SIMMONS: Appendix B is Jonathan
3 Krein using all of the --

4 THE COURT: Is that D.I. 678-21?

14:08:43 5 MR. SIMMONS: That's 690-6 through 11.

6 THE COURT: 690-6 through 11.

7 MR. SIMMONS: That's Jonathan Krein.

8 Frederiksen-Cross, which is the standalone, is 678-21.

9 The 5,000 is what happens if you subtract out -- it is

14:09:08 10 taking our headnotes, they then said here are the ones
11 we think are unprotectable, and that leaves you with
12 5,367.

13 THE COURT: That is D.I. 678-27.

14 MR. SIMMONS: Correct.

14:09:25 15 THE COURT: But the 690-6 to 11 is the --
16 the Krein Appendix B has the same --

17 MR. SIMMONS: It's got everything,
18 everything that you could possibly need, and then
19 sortables that you can find it on. So that to me is the
14:09:41 20 easiest because it gives you the full -- and then you
21 can find judicial opinions and see everything. The
22 Krein -- I'm sorry, the 5,000 or the 2,000 are our
23 attempts to say don't take my word for it, let's use
24 their numbers, and we can still win. Because I didn't
14:09:59 25 want to come in and tell Your Honor just do it my way

1 because you might think that's somehow creating a fact
2 issue.

3 THE COURT: D.I. 696-11 is a spreadsheet.
4 You may have logged a digital copy of this, but can you
14:10:14 5 get your paralegal just to follow up with a thumb drive
6 or some kind of link to the large file because the
7 capability of sorting and searching may prove useful.

8 MR. SIMMONS: Sure. Absolutely. I think
9 it is a spreadsheet, like a normal Excel, so you should
14:10:32 10 be able to just load it.

11 THE COURT: Right. That looks like it's
12 text, like a PDF. I'm saying if it is in an Excel form,
13 it would be sortable, categorizable, subtractable, et
14 cetera, in ways that the PDF is not.

14:10:46 15 MR. SIMMONS: We will get that to you.

16 THE COURT: Okay.

17 MR. PARKER: We are going to put all the
18 cards on the table and we should. Their motion starts
19 with we admitted because we didn't provide things to you
14:11:05 20 because under the virtual identity we didn't make any
21 admission at all.

22 THE COURT: Right.

23 MR. PARKER: Right. And so they start
24 with that premise. We say, you have to do a
14:11:15 25 side-by-side.

1 Now, the -- Krein does not have all the
2 5,000 because we didn't -- Krein was responding to our
3 filtration, which was 16,000. And I'm just telling you
4 now, by the time we finish talking about what numbers
14:11:31 5 should be subtracted from another number, I don't even
6 know what we're moving on.

7 If the Court wants to do this, then let's
8 just put our money where our mouth is. We'll give you
9 the quote, we'll give you the headnote, we will give you
14:11:46 10 the judicial opinion, and the Court can go to town.

11 THE COURT: Right. I already have that
12 in 678-21.

13 MR. PARKER: No, you don't have
14 everything. I'm saying put it in one place. Krein's
14:12:01 15 supplemental B doesn't have everything, Barbara
16 Frederiksen-Cross doesn't have everything. We just put
17 it all in one place. We will agree what the words are
18 and we'll do it. We'll eliminate the 86 headnotes.
19 Because they were sitting there in the 5,000. Right?

14:12:21 20 We'll eliminate -- there may be an argument about
21 whether any or some of these headnotes even are subject
22 to copyright. Because you can't keep extending
23 copyright on a work even if it sits in a compilation.

24 Rather than -- I literally don't know
14:12:37 25 which things are now in play. And we sit here and say

1 subtract this from that and look over here for some of
2 it, but it doesn't have it all but look --

3 THE COURT: The Court is going to do a
4 side-by-side. And the Court is going to do a
14:12:49 5 side-by-side involving, you know, headnote and opinion
6 -- now, it sounds like that is -- I thought I looked at
7 that in D.I. 678-21.

8 MR. PARKER: I will check. I am almost
9 certain that is not true. I am going to literally say
14:13:06 10 almost certain, but I believe that is not so.

11 THE COURT: All right.

12 MR. PARKER: It won't have the
13 judicial --

14 THE COURT: At the next break, let's have
14:13:14 15 the paralegals check both of these and see what you
16 agree has all three and what doesn't. And if you -- I
17 get your argument that the Court ought to be checking
18 these things. I thought I just saw a document that
19 purported to be one of the smaller of the spreadsheets
14:13:33 20 that had the three columns of all of these things where
21 the Court can just go and like, yes, this looks like the
22 judicial opinion; and no, this is not more than -- you
23 know, the bulk memo is worse than the headnote.

24 MR. PARKER: Understood.

14:13:47 25 THE COURT: But apparent to the naked

1 eye. And the Court will make sure it has that, but I
2 think the first thing to do is for the paralegals to get
3 on the same page about what is in each of those three
4 attachments. Because I thought I was just looking --

14:13:59 5 MR. PARKER: And if you may -- I am
6 3,000 miles from home. I would prefer if we were
7 allowed to just meet and confer outside of the school
8 and submit an e-mail to whomever you direct. And we can
9 say -- and if we have an argument, which I think we
14:14:18 10 might, we will deal with it.

11 MS. CENDALI: Yes. Your Honor, may I be
12 heard briefly on this?

13 THE COURT: Yes.

14 MS. CENDALI: It's been extremely
14:14:27 15 prejudicial for us the way they keep changing the sands.
16 We're here now, everything has been submitted. They had
17 optimal opportunity to do everything. The document
18 speaks for itself. There shouldn't be a supplemental
19 e-mail. People can talk during the next break and the
14:14:45 20 document is what it is. We're just --

21 THE COURT: I hope you guys can meet and
22 confer. I'll make the next break a prolonged one, if
23 needed, so that you can agree at least here is what we
24 all agree that this D.I. -- attachment to this D.I.
14:14:56 25 number is. And if it has the relevant categories that

1 Mr. Parker is asking about, that may be sufficient.

2 I understand his point that some of these
3 don't. And if the Court were to go to such a thing,
4 there is this question about whether ROSS should have
14:15:12 5 raised this earlier, submitted something else. But the
6 Court is in a position, I believe, to at least do a
7 comparison on the subset of what looked to me like the
8 2830 with the three columns.

9 MS. CENDALI: Yes. That's what we
14:15:28 10 believe. We believe that Your Honor has everything it
11 needs.

12 But I just wanted in the -- one more time
13 because I feel like, as we talk about this, something is
14 lost. I want to go back to our conversation about Feist
14:15:39 15 and the fact that the Court said that even a directory
16 that contains absolutely no protectable written
17 expression, only facts, meets the constitutional minimum
18 for copyright protection and features an original
19 selection and arrangement. Your Honor is obviously free
14:15:57 20 to also look to see for some of these headnotes, you
21 know, to what extent do they track the judicial opinion
22 or not and that's fine. But the point is, all of the
23 headnotes, 20,000 plus, which you heard Mr. Parker admit
24 were copied, all of them are protectable because it
14:16:16 25 doesn't matter --

1 THE COURT: I understand. But your
2 briefing it and Mr. Simmons are taking the both/and
3 approach. I have to decide on compilation and I have to
4 decide on the individual works.

14:16:27 5 MS. CENDALI: Yes. We're saying that, I
6 guess, there's two paths --

7 THE COURT: Yes.

8 MS. CENDALI: But the point is that the
9 -- that was the selection and arrangement. I just
14:16:37 10 wanted to --

11 THE COURT: I understand your argument.
12 It's been made. I think this is now sufficiently clear
13 to the Court --

14 MS. CENDALI: Thank you.

14:16:43 15 THE COURT: -- what the positions are,
16 what the arguments are. And I will certainly give you
17 guys some time to meet and confer, but we just have to
18 be sure about what it is that I'm looking at and what it
19 is that I have the ability to do this comparison as a
14:16:57 20 factual matter.

21 This is not computer code. I am a judge.
22 I read headnotes. I can tell when headnotes are close
23 to judicial opinions and what, if anything, they are
24 adding or what they are selecting and arranging.

14:17:09 25 MR. PARKER: I did not make an admission

1 on the copying, I just --

2 THE COURT: I understand you have not
3 made a concession on that, you're not making an
4 admission on copying.

14:17:18 5 There is still the issue, I have to
6 decide what to do with Frederiksen-Cross, but your
7 position on that is very clear.

8 Question 6: Record citations showing
9 either there is no disputed material fact or any
14:17:31 10 genuinely disputed material fact about actual copying
11 for each of the categories of headnotes including each
12 step. So I want to know about the steps about going
13 from Westlaw to being copied by LegalEase and then
14 having been placed by LegalEase into the bulk memos, and
14:17:46 15 then the use of the bulk memos by ROSS.

16 (Brief discussion held off the record.)

17 (Brief recess taken.)

18 THE COURT: Topic 6, Mr. Simmons, record
19 citations.

14:22:34 20 MR. SIMMONS: As the Court's prior
21 summary judgement opinion explained, there are two ways
22 of proving actual copying. One is through direct
23 evidence, such as LegalEase's admissions in its
24 deposition that it copied Westlaw. Those include 678-6
14:22:47 25 at 34 through 13. We also have Morae Global, which is

1 the subcontractor, in 678-4 and 195-14 through 19. And
2 there is also documentary evidence such as 678-84, which
3 is an e-mail exchange between the two of them.

4 Another way to prove actual copying is
14:23:11 5 proof of access and similarities probative of copying.
6 That's at page 8 of your prior opinion. There is no
7 question on access. LegalEase admitted in its
8 deposition that it had Westlaw credentials. That's at
9 D.I. 678-8 at 93:21 through 24. And Morae Global had
14:23:30 10 them too. That's 678-6 at 88 through 1922. So access
11 done.

12 All we have to do in that situation is
13 talk about probative similarities. Earlier I had
14 informed the Court about the Skidmore vs. Led Zeppelin
15 case. The citation for that is 952 F.3d 1051, 1064.
14:23:46 16 And the quote says there that for purposes of probative
17 similarity, such similarity may be based on the overlap
18 of unprotectible as well as protectable elements. So
19 the teaching of that case is that filtration doesn't
14:24:07 20 happen at the actual copying stage.

21 So there's a couple of ways the Court can
22 do this. All the Court needs to do is look at, again my
23 favor, Appendix B to the Krein declaration. That's D.I.
24 690-6 through 11. That has all of the headnotes and the
14:24:23 25 questions. If they look similar such that you think

1 copying occurred, actual copying is established. There
2 are numerous similarities there.

3 And faced with that, what ROSS would have
4 to have done is said, no, no, no, this was independently
14:24:39 5 created, and that's not an argument that they made. All
6 of the arguments in this case are about
7 unprotectability, not independent creation.

8 THE COURT: So you can do this from
9 similarity and eyeball it.

14:24:49 10 MR. SIMMONS: Yep.

11 THE COURT: But in terms of direct
12 evidence, the alleged copying by LegalEase -- okay,
13 we've got access. It doesn't sound like that's
14 disputed. I thought it wasn't disputed last time and I
14:25:07 15 so found.

16 But how about what we have direct
17 evidence of as the placement of the copied material,
18 above memos, which Mr. Parker keeps arguing, look, we
19 instructed them, don't use this, write it on your own,
14:25:18 20 et cetera. There are all these instructions. You
21 pointed to --

22 MR. SIMMONS: The best practices guide.

23 THE COURT: I think it was more than the
24 best practices guide --

14:25:28 25 (Simultaneous speakers.)

1 THE COURT: -- at pages 4, 8, and 13.

2 MR. SIMMONS: Let me walk you through the
3 best practices guide for ROSS Intelligence, which is
4 D.I. 678-36. I have it, which is what I'm going to read
14:25:37 5 from.

6 (Discussion held off the record.)

7 MR. SIMMONS: This is the document that
8 LegalEase created to train it and the Morae Global
9 contractors. Here is how you make a bulk memo.

14:25:54 10 So Mr. Parker this morning said that
11 there is a reference in this just saying the headnotes
12 are proprietary, which is true, but they also -- the
13 memo also says an easy way of framing questions is to
14 rely on the headnotes. Here are the steps in the best
14:26:11 15 practices guide that LegalEase used.

16 THE COURT: Who drafted the best
17 practices guide?

18 MR. SIMMONS: LegalEase. So this is the
19 people who are creating the bulk memos saying this is
14:26:20 20 how you do it.

21 Page 4, Westlaw. Do a headnote search.
22 "Click on the key numbers. You will be assigned a
23 number which is available under the key numbers."

24 Now, there is a picture of Westlaw at the
14:26:34 25 top of the page.

1 "Here, the key number assigned is 1 and
2 the topic is abandoned and lost property." And then it
3 has a picture of the key number system from the Westlaw
4 platform.

14:26:48 5 "2, click on a key number topic. The
6 best practice is to begin from the top, subtopic number
7 1, and follow the pattern." And it shows abandoned and
8 lost property and all of the key number citations under
9 that form the Westlaw platform.

14:26:59 10 "3, click on number 4, evidence and
11 questions for jury," which is one of the key numbers
12 under that.

13 "4, got this." Which then gives you all
14 the cases that go with that key number.

14:27:11 15 THE COURT: So this is your proof of the
16 second of the third, three steps I asked about.

17 MR. SIMMONS: Yes.

18 THE COURT: How about the third step, the
19 use of bulk memos by ROSS?

14:27:20 20 MR. SIMMONS: Sure. And I'll just note,
21 by the way, the punch line on this is that step 7 is
22 take headnote and make question. So that's the answer
23 on that. And there is other evidence on that too.

24 In terms of ROSS's use, this is an area
14:27:32 25 where the experts are actually oddly in agreement. So

1 Mr. Krein's rebuttal report at paragraph 34, that's our
2 expert, and Dr. Branting's opening report at paragraph
3 31 through paragraph 38 described the following process:

4 Step 1: An individual at ROSS copies and
14:27:52 5 pastes the contents of the memorandum into their portal
6 -- that's what my friend on the other side mentioned
7 earlier -- which would create a copy of the bulk memo in
8 ROSS's web database.

9 So bulk memo is like a thing that you get
14:28:08 10 sent over -- let's put it in the database, someone at
11 ROSS is putting that into the database -- that question
12 all the other material.

13 Step 2: An individual at ROSS would
14 assess whether the answers to the questions accurately
14:28:19 15 represent the relevance rating, which would require the
16 user to access the copy of the bulk memo on ROSS's
17 database and create a new copy in the random access
18 memory of the computer.

19 Because they are confirming that the
14:28:31 20 database is correctly copying the question.

21 Step 3: The data goes through a mapping
22 process where they verify the passage -- and I'm -- can
23 correct to the judicial opinions that they already had.

24 And then Step 4: A set of question and
14:28:45 25 the answer pairs that were to be used for training are

1 downloaded into the CSV file -- that my friend on the
2 other side mentioned earlier, which is just a
3 spreadsheet. And so what that spreadsheet has in it is
4 the list of all the questions and all the judicial
14:28:59 5 passages -- the great quote material that's there.

6 And so that was their process for every
7 single bulk memo. There is no question that that
8 involves copying of the memo questions which, as we say,
9 are based on the headnotes.

14:29:13 10 THE COURT: I understand what you allege
11 ROSS has taken from the headnotes. But clarify, what
12 are you alleging they have taken from the key number
13 system.

14 MR. SIMMONS: So the key numbers were
14:29:25 15 also contained in the bulk memos, both in the --

16 THE COURT: Just metadata were in the
17 files, but not in the text that was being crawled over.

18 MR. SIMMONS: So the number name was not.
19 But remember, the question and the great quote have a
14:29:39 20 relationship. And their expert, Dr. Branting, at, I
21 believe it's paragraph 11 of his rebuttal report, if
22 memory serves -- pardon if I'm incorrect -- actually
23 talks about the fact that they're learning -- that
24 they're teaching their AI about the relationship between
14:29:54 25 the headnote and the case great passage. So yes, it's

1 in the metadata, the file names, but it's also just the
2 nature of how the bulk memos are created is including
3 all of this different material.

4 THE COURT: One moment.

5 (Brief pause.)

6 THE COURT: All right. So this may be a

7 little repetitive of some things that Ms. Cendali

8 touched on, but try to distill for me, what is the

9 protected aspect of the key number system that you

10 allege that ROSS took? What is the protected aspect of

11 creativity or protectable elements of the headnotes that

12 you allege were taken? Because I am trying to

13 understand the gist of the claim.

14 MR. SIMMONS: So there is protection at

15 multiple levels. The fundamental legal question is what

16 did we add? So anything we added, anything we did is

17 protectable.

18 For the key number system, we chose the

19 names in the key number system, the organization in

20 which they appear, the subsets and everything else. It

21 is essentially its own work. It's itself -- it's

22 something that you can actually see in the Westlaw

23 system and say, oh, there's all these key numbers in

24 there. The headnotes, as Ms. Cendali said before the

25 break, we claim them at the selection arrangement level

1 because we chose what to make a headnote. But we also
2 claim the text that we wrote where we are taking
3 material and summarizing it, even if there is something
4 that looks similar to the judicial opinions -- you know,
14:32:17 5 in many of the cases we're doing some kind of
6 manipulation that makes it more than trivially
7 different.

8 In addition, as anyone who uses Westlaw
9 electronically knows, all of the headnotes are linked to
14:32:32 10 the passages of the text. So we have chosen that, not
11 only to make a headnote, but to make a headnote that
12 goes to a specific part of the opinion. It could have
13 been earlier, later, not had a headnote at all, and
14 that is critically important because that paring of our
14:32:47 15 headnote with the judicial text is what becomes the
16 question in great quote in the bulk memos.

17 THE COURT: Mr. Parker.

18 MR. PARKER: Oh, my turn. I didn't think
19 that was going to go that fast. I am going to take a
14:33:12 20 little bit longer. And I am going to give you the D.I.
21 cites after. Page 19.

22 I think we're all good about the best
23 practices guide. You can look at it yourself. But
24 also, there was no quote when it says, "take headnote,
14:33:31 25 make question."

1 THE COURT: Right.

2 MR PARKER: As I said to the Court

3 before, "Do not copy headnotes verbatim because

4 headnotes are generally not in the form that was

5 expected for the questions." That is actually a

6 deposition study. Best practices guide comes, was not

7 copy headnotes. There's another document, it's

8 Exhibit 59 from LegalEase. LegalEase directed attorneys

9 to "not to stick to headnotes or frame questions.

10 Rather, use them as a stepping stone."

11 And I said this earlier, each quote was

12 to represent four rankings. This apparent link to

13 passages -- I am now on page 20. You can look at the

14 bulk memos. There is no apparent link there and they

15 don't claim there is a link in metadata. It is a

16 question and an answer, and then a good top question and

17 an irrelevant question. And Jimoh Ovbiagele's

18 declaration tells you why we are not the training just

19 on great questions. You can't do that with AI. He

20 explains that. But it would be no good to have 25,000

21 great questions out of a world of how many cases -- I

22 have it written down. Millions and millions of cases in

23 this world, to have 25,000 great answers, that doesn't

24 -- you can't train AI.

25 THE COURT: So --

1 MR. PARKER: Go on. I can stop.

2 THE COURT: You're not disputing access.

3 MR. PARKER: No.

4 THE COURT: That is conceded.

14:35:20 5 Do you dispute that LegalEase actually
6 copied the headnotes at the first step?

7 MR. PARKER: If you talk about a --
8 femoral copy. In other words, you open up a Westlaw,
9 you are going to see those things.

14:35:36 10 THE COURT: Right.

11 MR. PARKER: You just are. The question,
12 though, I think is twofold. One is, are you using the
13 headnotes to find things like the utility --

14 THE COURT: But do you concede that, say,
14:35:51 15 the 2830, or whatever, headnotes were copied by
16 LegalEase into the bulk memos?

17 MR. PARKER: No.

18 THE COURT: That they were copied from
19 the screen onto something else in the process of
14:36:02 20 creating the bulk memos.

21 MR. PARKER: No. I'm not going to --
22 that is not in the evidence at all.

23 THE COURT: How about the use of the bulk
24 memos by ROSS? You concede that ROSS used all the bulk
14:36:13 25 memos to train in its AI.

1 MR. PARKER: No, that is not true,
2 either.

3 THE COURT: Okay.

4 MR. PARKER: No, not even a little bit.

14:36:18 5 They discarded some. They didn't match up, or they
6 didn't think they were -- it's in our papers.

7 THE COURT: They discarded some of them.

8 MR. PARKER: Yeah.

9 THE COURT: Do you concede they used the
14:36:24 10 bulk of them?

11 THE COURT: Do you concede they used the
12 bulk of them?

13 MR. PARKER: They used 80 percent.

14 THE COURT: 80 percent of them, and they
14:36:31 15 kept the other 20 percent aside?

16 MR. PARKER: Yes.

17 THE COURT: Do we have a way of lining up
18 which 80 percent with individual headnotes?

19 MR. PARKER: No.

14:36:39 20 THE COURT: Okay. The 80 percent was
21 randomly sampled?

22 MR. PARKER: Yes.

23 THE COURT: So statically, if there were
24 thousands, the chance that none of those thousands would
14:36:51 25 show up in the 80 percent, you can do the math.

1 MR. PARKER: Right. So, you know, the
2 statement was that we were trying to teach the
3 relationship between a headnote and a great quote. That
4 is just not true.

14:37:04 5 First, that assumes we copied headnotes
6 verbatim.

7 THE COURT: Okay.

8 MR. PARKER: That assumes that the
9 headnotes are not just judicial opinions.

14:37:12 10 THE COURT: So you conceded that there
11 was a femoral on the screen copied, but nothing from
12 there --

13 MR. PARKER: Right.

14 THE COURT: -- yet?

14:37:16 15 You do?

16 But you do not concede that it made it
17 from the screen into the bulk memo.

18 MR. PARKER: Correct.

19 THE COURT: Right. So that is where the
14:37:23 20 dispute is, and then there is a dispute about the
21 placement -- you did the copying at the first stage.
22 You dispute that it was placed in the bulk memos. You
23 say -- you concede that 80 percent of the bulk memos
24 were used in the training but you can't say which
14:37:37 25 80 percent.

1 MR. PARKER: No. No one can.

2 THE COURT: But yes, you concede
3 80 percent were used?

4 MR. PARKER: Of course. It's in our
5 papers. No question.

6 THE COURT: Yes. All right.

7 MR. PARKER: Let's go to the headnote --
8 I mean, to the key number system in the bulk memo.

9 So this Court can look at the bulk memo;
10 we have given you an example. There is no key number
11 referenced; there's no synopsis. There's no Westlaw
12 content that is -- you can look it, it's not there. It
13 is a question and an answer.

14 Of the memos: 1,534 contained a legal
15 copy as a file name. 24,000 or 23,000 and something odd
16 have not been. So the legal topic.

17 THE COURT: Were the file names or the
18 meta data being used or called or recognized by this AI?

19 MR. PARKER: No.

20 THE COURT: No, they were not.

21 MR. PARKER: And I will tell you how I
22 note that. There's reference to the classified project,
23 which they claim is an infringement. We received --
24 ROSS sent to -- I mean. Sorry. LegalEase sent to ROSS
25 91 topics, the highest level topics in the key number

1 system.

2 ROSS reduced it to 38 of its own topics
3 because they were trying to figure out if their error
4 would work, if you could take civil procedure cases and
14:39:08 5 label them as civil procedure cases, not in a key number
6 way, but just say this is a civil procedure case. They
7 abandoned them.

8 There is no evidence at all that their
9 legal search engine had any kind of classification
14:39:16 10 process at all, and, in fact, they say it doesn't,
11 that's it; that is the close of the evidence.

12 We say with evidence it didn't happen
13 that way, and they still want to maintain that somehow
14 this classified project came through, and it just
14:39:32 15 didn't.

16 THE COURT: One other question about the
17 80 percent, 20 percent.

18 MR. PARKER: Yes.

19 THE COURT: You say the 20 percent were
14:39:37 20 set aside for cross-checking.

21 MR. PARKER: Yes.

22 THE COURT: So they were used at a later
23 stage in the cross-checking.

24 MR. PARKER: They were used for training
14:39:46 25 and validation of whether or not the featurization was

1 occurring properly, but in that way, they were used.

2 THE COURT: So all hundred percent were
3 used, but 80 percent were used --

4 MR. PARKER: No.

14:39:58 5 THE COURT: -- upfront and 20 percent
6 later.

7 MR. PARKER: No. There were memos
8 discarded. I don't know how many; no one knows how
9 many. It's not in the record. 80 percent of what
14:40:05 10 remained after things were discarded were then used to
11 train 20 percent to use to validate.

12 THE COURT: So a hundred percent of what
13 was not discarded was used: 80 percent upfront;
14 20 percent later?

14:40:19 15 MR. PARKER: Correct.

16 THE COURT: Who talks about what was
17 discarded in the record, and where would we find
18 anything out about it?

19 MR. PARKER: Sure. I don't think that
14:40:26 20 you're going to -- let me see this.

21 MR. PARKER: Page 22. The -- okay. Late
22 declaration as well as the markets declaration.

23 ROSS received 500 judicial opinions, and
24 we have already talked about that where ROSS says, we
14:40:59 25 don't want all of this stuff.

1 Next: ROSS then extracted the question
2 and answers. They featureised. They tore apart any
3 relationship between the questions and the great quotes
4 or any other quotes because they featureised things in a
14:41:17 5 way that they are just talking about world
6 relationships.

7 I have talked about featurization and I
8 think we've had enough conversation about that, and none
9 of that is disputed.

14:41:39 10 I think that's -- I think that may cover
11 it. Do you have any questions?

12 THE COURT: No, not at all. Not for you.
13 I am going to go back to Mr. Simmons now. Thank you.

14 Mr. Simmons, what do I do about this
14:41:58 15 unknown numbers of things that were discarded?

16 MR. SIMMONS: So it doesn't matter
17 because the copying -- the copying occurred before you
18 even get into the training. So we can talk about the
19 training.

14:42:08 20 THE COURT: On the vicarious, but on the
21 direct liability.

22 MR. SIMMONS: No, on direct liability.

23 As soon as -- all of the memos end up in
24 the CSV file. All of the memos are in the database.

14:42:19 25 THE COURT: Did all of them go to ROSS?

1 MR. SIMMONS: Yes. All the -- all the
2 25,000 we've been talking about go over the transom, end
3 up on ROSS's database, end up in the CSV file.

4 THE COURT: Okay. Mr. Parker, do you
5 agree?

6 MR. PARKER: I do. I just don't agree
7 there is a copyright violation by stating the facts.

8 MR. SIMMONS: Okay. The debate you are
9 having is then at the stage of, okay, we got them, what
10 are we doing with them on the system itself, the
11 training of it exact - itself?

12 As Mr. Parker indicated, 80 percent were
13 used to train upfront, 20 percent were used for
14 validation. So they are all, again, being copied into
15 it, but it doesn't really matter because at this point,
16 all of those questions are already in the ROSS system,
17 they have already been copied over. So I went on direct
18 infringement at that point. I don't need to go the
19 extra step and say, and then here are the specific ones
20 that went into the training of the ROSS platform.

21 Even if I did, however, the fact that we
22 have the memos there in the system and the direct
23 evidence that they were used should be enough to get a
24 finding of actual copy.

25 Again, we don't have to prove every

1 single thing; we have to prove more than di minimus use,
2 which we have done.

3 Just a couple of points I had. One was
4 there was a lot of discussion of what ROSS knew or what
14:43:40 5 people were told. None of that matters for direct
6 infringement. This is strict liability. So knowledge
7 and we didn't want doesn't matter. LegalEase did it;
8 they're liable. And ROSS is secondarily directly liable
9 for that result.

14:43:55 10 THE COURT: There is -- we will talk
11 about infringement later. That's not -- there's
12 liability, but there is a possible defense over there.

13 MR. SIMMONS: Maybe -- I mean,
14 infringement, although, the copyright notice means that
14:44:06 15 they don't get one.

16 But in addition to that, the record is
17 replete with examples of ROSS actually wanting them to
18 use Westlaw. Yes, there is sort of this wink and a nod
19 of don't use it, na, na, na, na. But you see them
14:44:19 20 giving them Westlaw material over and over again.
21 There's this best practices guide that says, take the
22 headnote and make that into a question. The idea that
23 people weren't using Westlaw is questionable.

24 And then, just finally, on the key number
14:44:35 25 system. Again, the metadata and file names copied over,

1 so I don't have to remove the training of it, but in it,
2 I will direct the Court to D.I. -- I think it's the
3 Miranda Means, first declaration, Exhibit 23, which is
4 the Klein report, that talks about how the raking
14:44:57 5 algorithm at Paragraph 11 learns relevancy from the
6 relationship between the questions and answers.

7 And then at paragraph 14, it talks about
8 how the key numbers were used to make sure they were
9 getting full coverage of all the issues of law.

14:45:13 10 Because, as you can imagine, it is a
11 search platform. So the reason you want to make sure
12 you are covering all the things, is, if I know a whole
13 lot about the maritime law and you ask me something
14 about the copyright law, AI might not know anything. So
14:45:29 15 you want to make sure you are getting full coverage of
16 all the issues. That's how the key numbers go used in
17 the system.

18 THE COURT: Mr. Parker.

19 MR. PARKER: There is not a lick of
14:45:40 20 evidence that supports any statement that the key
21 numbers were adjusted into the system. There isn't. Of
22 the 25,000 memos, there are legal topics on 1,500.
23 There is literally no evidence that ROSS received a
24 single key number except when they received the 500
14:46:00 25 judicial opinions, and they said, "We don't want it."

1 And the only other is that ROSS received
2 91 topics, and reduced it to 38 of their own topics and
3 then discarded the other.

4 There is no evidence at all that in the
14:46:17 5 training data there were key numbers or the source code
6 has anything in it. Again, we not only have affirmative
7 statement of that, our expert tried to reverse-engineer
8 to find stuff. They have access to the source code.
9 They could have come and told you, we found it. They
14:46:41 10 are just speculating.

11 I think that may be it. There is one
12 other thing that I wanted to tell you that's on -- I
13 know. I think I want to be careful about this copying
14 idea. All right. Because I think it's two different
14:47:05 15 things.

16 LegalEase's copying, meaning the femoral
17 copy, and that is one set of things.

18 THE COURT: That's conceded.

19 MR. PARKER: There is another about what
14:47:22 20 ROSS received from LegalEase. LegalEase does not admit
21 to copying -- and I'm referencing -- does not admit to
22 copying headnotes to make them into questions. I have
23 given you that --

24 THE COURT: Right. That's where the
14:47:36 25 Court then will have to decide whether to infer or just

1 actual copy.

2 MR. PARKER: Yes. I am just leery about
3 just saying LegalEase copied, and then that sort of ends
4 at a bunch of queries.

14:47:49 5 THE COURT: But you also don't dispute
6 what Mr. Simmons says, that the actual copying stage,
7 protectable and unprotectable, too. It is the
8 substantial similarity, I felt they are only
9 protectable.

14:48:01 10 MR. PARKER: Yes and no. I mean, I think
11 it's careful -- you have to be careful, if the words of
12 the judicial opinion are the same words in a headnote,
13 then you don't know whether the headnote was actually
14 copied, even if you don't filter.

14:48:13 15 I'm not saying -- we are not arguing
16 whether it's protectable or not. I'm just saying how
17 you can't infer that LegalEase went to the headnote
18 instead of just the judicial opinion.

19 THE COURT: But the argument, based on
14:48:29 20 the Frederiksen-Cross chart reads, when the level of
21 similarity of the bulk memo is more similar to the
22 headnote than is -- the original judicial opinion, the
23 logical inference is this was copied.

24 MR. PARKER: If they use the same words.

14:48:47 25 THE COURT: Yes.

1 MR. PARKER: Right?

2 I mean, that's -- the danger is we can't
3 just say the headnote is dissimilar to the judicial
4 opinion, therefore the headnote must have been copied.

14:48:59 5 There are instances where the headnote
6 and the judicial opinion and the question -- I don't
7 even know where they got the question from, and there
8 would be great dissimilarities. There are those
9 instances.

14:49:11 10 So that's why Barb is making some
11 admission by saying, you know, this doesn't add up, to
12 me. I can't find the similarity; it doesn't answer the
13 question. Because literally, the questions are like,
14 who knew? Who knew?

14:49:28 15 THE COURT: The Court will examine the
16 chart and make the side-by-side comparisons.

17 THE COURT: I am going to take a recess
18 now until 3:30. I hope that the parties can get the
19 paralegals together and agree upon which sharks have the
14:49:45 20 relevant three columns in them, because there seems to
21 be disagreement about what I thought I saw with my own
22 eyes, and maybe we are looking at different documents
23 and different D.I.'s, but let's get on the same page
24 about that.

14:50:00 25 We'll come back at 3:30, and we'll cover

1 Topics -- Question 7. We will cover a few miscellaneous
2 issues kicking around, and we will cover some trial
3 management. And then I will confer and figure out, you
4 know, are we going to reconvene tomorrow? What
14:50:18 5 follow-up issues there are if we do reconvene tomorrow.

6 MR. SIMMONS: Your Honor, if I can just
7 -- before you leave, I had mentioned Exhibit 23. That
8 is actually the Branting declaration, that's their
9 expert. You can see the system we were discussing
14:50:33 10 earlier.

11 THE COURT: In terms of the metadata.

12 MR. SIMMONS: In terms of use of the key
13 numbers to confirm that they were getting full coverage
14 of the practices.

14:50:41 15 THE COURT: That they were getting full
16 coverage.

17 MR. SIMMONS: Yes.

18 THE COURT: All right. We'll recess
19 until 3:30.

14:50:43 20 THE DEPUTY CLERK: All rise.

21 (Recess.)

22 THE COURT: Before we proceed to question
23 7, was there anything specifically about the comparison
24 notes on which charts included which column and the
16:34:03 25 like?

1 MS. CHANG: Good afternoon, Your Honor.
2 Yungmoon Chang on behalf of plaintiffs.

3 So at the Court's direction attorneys
4 conferred during break and I'm happy to report that ROSS
16:34:13 5 agrees that two of the exhibits that were cited on the
6 record do contain the information requested by the
7 Court. Specifically docket 678,21. This was the
8 exhibit that my colleague Mr. Simmons referenced that he
9 had examined Ms. Barbara Frederiksen-Cross during
16:34:34 10 deposition.

11 THE COURT: Ms. Frederiksen-Cross 2830
12 headnotes, correct?

13 MS. CHANG: That's correct, Your Honor.

14 THE COURT: And that is different from
16:34:45 15 the various exhibit Bs on or exhibit Ds.

16 MS. CHANG: Correct, Your Honor, however,
17 the parties do also agree that appendix B to the
18 supplemental Krine report also contains the requested
19 information which is the judicial opinion, the headnote
16:35:00 20 and the memo question. So that's docket entry 690-6
21 through 11. That's that large 6-piece file.

22 THE COURT: Yes, that is the 6 pages of
23 the spreadsheet.

24 And what's the number of headnotes in
16:35:16 25 that one? Is the entire universe of the 25,000?

1 MS. CHANG: That's correct, Your Honor.

2 So what we're happy to do for the Court,
3 if the Court would like, is to provide native Excel
4 versions of those spreadsheets.

16:35:32 5 THE COURT: I want you guys meet, confer,
6 agree this is the same as those items that are already
7 in the record. It's just in a native Excel format
8 rather than a pdf or paper format. And the parties can
9 get the paralegals together and submit that. That would
16:35:49 10 assist given the volume of headnotes here.

11 MS. CHANG: We are happy to do that,
12 Your Honor. Thank you.

13 THE COURT: So who's handling question 7?

14 MR. SIMMONS: Me again, Your Honor.

16:35:59 15 THE COURT: Mr. Simmons.

16 MR. SIMMONS: Your Honor, may I begin.

17 THE COURT: Yes.

18 MR. SIMMONS: Rule 54 B is entirely
19 consistent with the law of the case doctrine. There is
16:36:25 20 no question that under Rule 54 B the Court has the power
21 to revisit its prior rulings.

22 As Your Honor is aware the rule itself
23 says that any order or decision that adjudicates few
24 than all the claims does not an exempt in the action as
16:36:38 25 any of the claims can be revisited at any time before

1 judgment on the claims.

2 What the law of the case doctrine does is
3 the Supreme Court in Christianson versus Colt Industries
4 explained, is provide a rule of practice for when a
16:36:54 5 Court exercises its discretion that would promote
6 finality and efficiency. That's 486 U.S. 800 at 8916.

7 In re: Pharmacy Benefit Managers
8 antitrust litigation, the Third Circuit emphasized the
9 importance of maintaining consistency and avoiding
16:37:12 10 reconsideration of matters once decided during the
11 course of a single continuing lawsuit. That's 582 F3d
12 432 at 439.

13 Now, this applies to both conclusions of
14 law and findings of factual findings as noted in
16:37:30 15 Kagerise versus Susquehanna Township School District.
16 That's 325 F.supp 3d 564 at 589.

17 Thus, for example, this Court previously
18 concluded that loss actual copying at a prior opinion
19 and that copyrighting the compilation extends to the
16:37:50 20 copy writable pieces of that compilation. That's the
21 opinion at 5.

22 Given that the parties proceeded to trial
23 and briefed summary judgement, with those holdings in
24 mind it would be the epiphysis of finality to reconsider
16:38:01 25 those now.

1 That being said, it is not to say the
2 Court can't reconsider things in its prior ruling. The
3 Third Circuit in Pharmacy Benefit articulated when rules
4 could be reconsidered under that rule of practice.

16:38:15 5 The two most clear examples are Ruten
6 Kristen which afforded them as extraordinary
7 circumstances. Those are decisions clearly erroneous
8 from where they would manifest injustice. That's at
9 816.

16:38:29 10 But the Third Circuit also recognizes
11 when new evidence is available or a law has been
12 announced. That's Pharmacy Benefit at 582 F3d at 439.

13 And, finally, the trial judge, and I'm
14 quoting here, is not precluded from clarifying or
16:38:46 15 correcting an earlier ambiguous ruling or reconsidering
16 an issue when it appears a previous ruling even if
17 unambiguous might lead to an unjust result. That's
18 again Pharmacy Benefit 439.

19 So here the Court shouldn't change the
16:39:01 20 issues that were conclusively decided but where the
21 Court left things open or was otherwise thinking that it
22 would be a better course to change them, you still have
23 the power to reconsider. It's just a question of how do
24 you exercise your discretion to do so.

16:39:15 25 THE COURT: All right. So that makes

1 more sense that you recognize ultimately it's a matter
2 of discretion and there's guidance as to that
3 discretion. I was a little puzzled by the way you
4 phrased it in your reply brief at pages 7 and 8.

16:39:29 5 Protectability, actual copying of the table, whereas you
6 asked for summary judgment on issues that decided unfair
7 use, issues that I decided to leave open.

8 So is your only response or your main
9 response that on the stuff I left open you can ask me to
16:39:44 10 reconsider, but the stuff that I took off the table I
11 have discretion on but you say the guidance is I
12 shouldn't likely go back on the way that I decided it
13 earlier.

14 MR. SIMMONS: So the answer is you have
16:39:58 15 the power to do whatever Your Honor would like to do.

16 In terms of how to exercise that discretion consistent
17 with the law of the case doctrine what we would say is
18 for the issues that you conclusively decided, in other
19 words, essentially granted summary judgment on, which
16:40:09 20 were just those narrow issues, that we think should be
21 done. That should be law of the case. But as of things
22 where you said well, we're going to go to trial, I think
23 we'll see what the contours are as we get closer, fair
24 use being a great example of that, those should still be
16:40:26 25 on the table because you never conclusively decided as a

1 matter of law or a matter of fact those issues you
2 didn't grant summary judgment on here.

3 THE COURT: Thank you.

4 Mr. Parker.

16:40:37 5 MR. PARKER: I feel doubly at a loss here
6 for this reason, two cases were just cited. I don't see
7 those cases in the reply brief, which raises this other
8 argument that it's raised in the reply brief. It's
9 waived. There is a Third Circuit case 379 Fed --

16:41:04 10 THE COURT: The first time in the reply
11 brief is not proper --

12 MR. PARKER: Correct. I sent to you an
13 unpublished opinion only because that one is where the
14 Court -- the Third Circuit reversed saying you can't
16:41:17 15 consider an argument already raised. Now I feel at a
16 loss here myself because I think I just heard two new
17 cases --

18 THE COURT: Mutually. Is there a
19 procedure impediment to my revising any part of my
16:41:32 20 prior --

21 MR. PARKER: No. No. No. Rule 54(b)
22 says you may -- your decision may be revised at any time
23 before entry of judgment.

24 THE COURT: That's how I read it.

16:41:40 25 MR. PARKER: Runyan, Williams vs. Runyan,

1 says, "Although it is often said that the law of the
2 case doctrine does not limit upon the trial court from
3 reconsidering the appellate decisions, this Court has
4 considered to" -- "credential consideration. The Court
16:41:54 5 must explain the reason behind its decision" -- you did
6 it -- "the Court must take appropriate steps so the
7 parties are not prejudiced in reliance."

8 There are other Third Circuit cases that
9 say the same. I have to also say this: I find this a
16:42:10 10 bizarre moment because the original ruling of this Court
11 was to deny summary judgment. I have no idea what it
12 means to be open or closed.

13 You made a decision on summary judgment.
14 To me, that would have meant, back in September 2023,
16:42:25 15 you can't reopen. I am not making the argument you
16 can't reopen. I'm just saying, if you really believed
17 you can't reopen, then there is no reason to stop in
18 August of 2024. You have to go back to September 2023.

19 And there is nothing that says open and
16:42:41 20 close and denial of summary judgment. I don't
21 understand that. That fancy -- that is a pretty fancy
22 argument to weave through what happened.

23 And so I'm done. I just think if you're
24 going to do this, then we're going back to
16:42:56 25 September 2023, and I will be -- that it was better off

1 then than it was.

2 THE COURT: Got it. All right. I don't
3 see that we need any back-and-forth on this.

4 MR. SIMMONS: No, Your Honor.

16:43:08 5 THE COURT: Okay. Couple more questions.

6 First of all, we've talked in shorthand about this being
7 kind of like liability versus defenses and damages, but
8 my understanding is -- now I didn't ask you to move on
9 and I know you did move on tortious interference, but

16:43:33 10 that is a claim that is still open, and presumably would
11 need to be tried.

12 Mr. Parker, is that your understanding?

13 MR. PARKER: You told us not to move on
14 tortious interference. And, yes, that would still need
16:43:45 15 to be tried.

16 MS. CENDALI: Yes, and we discussed that
17 Thursday Zoom pretrial or whatever, that hearing, that
18 the tortious interference would still need to be tried.

19 THE COURT: Okay. So that's the first
16:43:57 20 thing I wanted to clarify.

21 Second, Ms. Cendali, innocent
22 infringement. Does it matter that the bulk memos didn't
23 bear Westlaw's copyright notice?

24 MS. CENDALI: It -- my partner, Ms. Chang
16:44:13 25 will cover that. Thank you, Your Honor.

1 MS. CHANG: Your Honor, the question is
2 whether it matters that the bulk memos for the copyright
3 notice or not. And the answer to that is, no, according
4 to the plain language of the statute.

16:44:34 5 So directing the Court to 17 U.S. Code
6 Section 401(d), what the section specifically states is
7 that, "If a notice of copyright in the form and position
8 specified by this section appears on the published copy
9 or copies to which a defendant...had access..."

16:44:51 10 Here, it is undisputed that defendants --
11 eventually, the defendant was able to obtain limited
12 access to Westlaw. And there are documents showing that
13 there is no dispute of fact they, in fact, had printouts
14 from Westlaw bearing the copyright notice.

16:45:08 15 I would also direct --

16 THE COURT: But there is this issue that
17 they had printouts of the 500 opinions, but the
18 headnotes and the key numbers are being claimed
19 separately and those are the items claimed to have been
16:45:23 20 infringed.

21 MS. CHANG: And to clarify, Your Honor,
22 what the statute requires is that the work itself bear a
23 copyright notice. The statute doesn't say anything
24 about having the constituent elements -- so involved in
16:45:36 25 that second step of copyright infringement -- the

1 statute does not require that the constituent elements
2 that are being excused of copying, that every single one
3 of those bear a copyright notice.

4 Indeed, that requirement would run afoul
16:45:50 5 of what the plain language of what the statue really
6 says.

7 And, Your Honor, I'd also direct the
8 Court, there are statements in ROSS's opposition where
9 they admit that Westlaw does bear a copyright notice and
16:46:03 10 that every printout from Westlaw bears a copyright
11 notice.

12 Additionally, Your Honor, it's not just
13 the cases that they had that -- that had that copyright
14 notice, there were actually search result printouts that
16:46:15 15 bore the copyright notice, and those were circulated
16 internally. I don't want to reference any of the names
17 for confidentiality reasons, but this is laid out in our
18 reply brief on page -- I believe it's 18 and 19.

19 THE COURT: Okay. Does Mr. Parker or
16:46:41 20 anyone else want to respond to Ms. Chang's factual or
21 legal?

22 MR. PARKER: So much of their argument is
23 based on activities that occurred after the bulk memo
24 project and are not identified as infringing. Receiving
16:47:01 25 something in the mail which you say, I don't want this,

1 is actually -- I don't --

2 THE COURT: The receipt of the 500
3 opinions, that was before the bulk memo project,
4 correct?

16:47:11 5 MR. PARKER: It was at the end of the
6 bulk -- I actually don't know that -- the timeline. It
7 was at some point in the process. But, again, they
8 weren't used and they were returned. I don't know how
9 you -- receiving and saying, I didn't want this and I
16:47:26 10 don't want this.

11 Also, the copyright is -- and it
12 repeated -- I think it ends, the copyright does not
13 cover government works. So my clients believe they're
14 receiving judicial opinions.

16:47:45 15 That is not evidence that it is a
16 copyright because the copyright doesn't extend to those
17 judicial opinions.

18 THE COURT: Right. The tricky thing
19 about Westlaw is at the bottom of the page it says
16:47:52 20 copyright, but this has no claim to who has covered the
21 works.

22 MR. PARKER: Exactly.

23 THE COURT: Ms. Chang, do you want to say
24 anything further?

16:48:07 25 MS. CHANG: I would just like to clarify

1 this for the Court. The appropriate inquiry for
2 innocent infringement isn't about whether the defendant
3 actually received the notice. The plain language of the
4 statute is clear. It's whether the published work
16:48:26 5 itself had a copyright notice. That's not disputed
6 here, Your Honor.

7 THE COURT: Okay. Anything further on
8 that, Mr. Parker?

9 MR. PARKER: No.

16:48:33 10 THE COURT: Very good.

11 Let's talk about the key numbering system
12 in the fair use analysis. I don't know if Ms. Cendali
13 wants to speak to this.

14 There is a whole lot of briefing, and the
16:48:45 15 focus of both sides is primarily on the headnotes. Is
16 there anything unique about the way the key numbers were
17 used that bears on the fair use analysis?

18 MS. CENDALI: The fair use analysis is --
19 we were not intending to in any way limit or say that
16:49:12 20 fair use should have some special lesser or greater with
21 regard to the headnotes. The West Key Number System is
22 a key part of our copyright, which as you heard
23 Mr. Simmons describe was what was walked through to get
24 the headnotes, to get the questionnaire and some
16:49:35 25 pairings, but also to get coverage of the -- to make

1 sure that ROSS was replicating us in getting full
2 coverage.

3 That is the -- one of the hearts of our
4 work that people know of us for, the West Key Number
16:49:52 5 System. So therefore, when you look at the different
6 fair use factors, all the different arguments with
7 regard to the West Key Number System, are even stronger,
8 the least bit strong, especially when you talk about the
9 nature of the work that is a incredibly innovative,
16:50:14 10 ever-changing taxonomy.

11 And that is -- that's what I want to back
12 to something that's a big factor too. Part of the
13 reason Factor Two is, which in our view, is that we win,
14 is that the nature of the work is why they copied it.
16:50:28 15 In other words, you know, sometimes people copy for
16 other reasons and the nature of the work isn't as
17 important because -- because, you know, it's kind of the
18 tail wagging the dog.

19 But here, the nature of the work is why
16:50:42 20 they copied it, because they wanted those pairs, they
21 wanted to take advantage of the West Key Number System,
22 and those pairs populate those relationships.

23 THE COURT: Got it.

24 Mr. Parker, would you like to respond?

16:50:54 25 MR. PARKER: You know I do.

1 So first, I'm not even sure that there is
2 an infringement claim on the key numbering system at all
3 as to ROSS. We can just start there. They don't appear
4 in the memos, they don't appear in the metadata. When
16:51:18 5 they keep talking about coverage. In Krein, they have
6 5,000 --

7 THE COURT: The key numbers themselves
8 don't, but the phrases associated with key numbers,
9 don't they show up in the metadata.

16:51:31 10 MR. PARKER: No. I mean, here is the
11 difficult part, one of the key numbers is civil
12 procedure. I mean, we use that. You can't help but use
13 it. Another is criminal law, another is administrative
14 law. To say that you can't use those terms because they
16:51:47 15 are the key number system...

16 THE COURT: Got it.

17 Now, Mr. Simmons was saying, Well, the
18 key number system structured the way they did their
19 searches to make sure they covered all the subparts and
16:51:59 20 the subquestions.

21 MR. PARKER: I got you. There are 5,473
22 headnotes associated with key numbers that they claim
23 infringe. That's another 21,000. Once you get rid of
24 all the -- it's 5,473 key numbers associated with those
16:52:18 25 things. In total, there are 100,000 key numbers.

1 That's it. I mean, far from trying to replicate, you
2 can't replicate by having less than 5 percent of the
3 entire key number system.

4 And if you look, they're all in the Krein
16:52:37 5 exhibit, and -- that the reference is to our ROSS motion
6 at page -- I think I put 7. It doesn't come close to
7 covering the 140-some-odd topics. It does not come
8 close to drilling down into any one particular topic.

9 So it is -- it is -- and, again, when you
16:53:06 10 look at output, there is no key number system. None.
11 And the cases aren't organized by what type of case they
12 are. There is no evidence that when you did a query
13 somehow these cases were organized in some fashion that
14 would even come close to replicating the key number
16:53:31 15 system. Just nothing.

16 So from a fair use analysis, even if you
17 assume that somehow there were 5,473 key -- key numbers
18 somehow associated -- which our clients didn't see,
19 didn't have. You can look at the questions and the
16:53:49 20 memos, and I would challenge anybody to say, find me the
21 headnote that this is associated with. Because also,
22 the headnotes and the key numbers, they get really
23 finely grated down. I mean, it's not just three
24 numbers, it's, you know, one with a key, and then 5-875.

16:54:13 25 No one is going to know how to work

1 backward in time without having the actual headnote.
2 There is no evidence we had the actual number. So
3 that's what's confounding to me a little bit about
4 this --

16:54:21 5 THE COURT: No, I get it. If I were
6 Ms. Cendali, I would respond, the test isn't that you
7 would be able to reverse engineer something, the
8 question is are you learning something about the
9 relationship between the headnote and the text that it
16:54:37 10 refers to, or the question and the answer.

11 MR. PARKER: I think they are two
12 different things. The first is to respond that we are
13 trying to replicate the entire key number system, and
14 that is literally impossible given the facts of the
16:54:49 15 case.

16 THE COURT: It's not. Okay.

17 MR. PARKER: The second piece is, we did
18 not use the key number system. That's not our output.
19 We don't use the materials at all. So even if somehow
16:55:00 20 you want to say we tried to figure out a way -- I don't
21 know how you do that when you don't have everything to
22 relate back to -- you don't have a coherent structure.
23 That is all ripped out in the featurization.

24 These aren't just extra strange words,
16:55:21 25 but -- when they're asking what the question and answer

1 is, again, we're going back to some idea that there was
2 a link, and there is literally no link. And by the time
3 you're done, the link is completely eliminated between
4 answer and question, which then confounds how is that a
16:55:39 5 key number system, and if the key number system would
6 help you in any way.

7 That's the argument. And we're talking
8 fair use so you do look at the final result and you
9 said, Okay, I don't see anything here.

16:55:50 10 THE COURT: Okay.

11 MS. CENDALI: May I respond?

12 THE COURT: Yes.

13 MS. CENDALI: Two points. My friend
14 mentions that, Oh, well, we use criminal law or
16:56:07 15 something like that. The 25,000 memos are far more in
16 detail than just criminal law and civil procedure, all
17 of which copy and all of which came from the key number
18 system.

19 You heard Mr. Simmons say that's what
16:56:20 20 they did, they walked through the West Key Number
21 System.

22 But the question on fair use isn't
23 infringement, what was copied, but what was the purpose
24 of it. And I go to their own expert, Mr. Branting, at
16:56:37 25 Exhibit 23 of the first Means declaration.

1 And what he said in paragraph 14 is, "The
2 purpose of developing a large training set was to ensure
3 that the ranking algorithm is trained on better and
4 worse answers to a full range of representative" --
16:56:56 5 question mark twice -- "questions in different areas of
6 law are often expressed using different language so this
7 diversity of language and expression can be achieved by
8 developing questions for diverse cases, as done by
9 ROSS."

16:57:08 10 When you read Exhibit 23, he admits that
11 the West Key Number System that was being used is part
12 of the training. And I think that -- I'm getting a
13 little bit concerned about, again, losing the forest for
14 the trees, like Mr. Parker mentioned, again, oh, well,
16:57:30 15 featurization. That is, like -- means nothing. What
16 matters is what the purpose was for the copying.

17 You can't blind the Court by science.
18 And if it meant nothing, then the whole purpose of why
19 they trained, it's inconsistent. The whole point is
16:57:52 20 they wanted these pairs. They said they wanted these
21 pairs. That's the whole purpose of the training.

22 So if they're really standing here
23 saying, "Well, he just took everything apart, it meant
24 nothing," that's not consistent with their experts said,
16:58:06 25 what their fact witnesses said, or what they said their

1 purpose was. This wasn't a situation of learning about
2 language. This was trying to figure out how to answer
3 legal questions by copying Westlaw's editors.

4 THE COURT: Anything further?

16:58:22 5 MR. PARKER: Yes, briefly.

6 I think there are -- let's just start
7 with purpose, because it's a bit confounding. We
8 certainly needed to know what the language of the law
9 was. We needed to know the good, the bad, and the
16:58:45 10 indifferent. So every memo did not just simply match a
11 great question to a great answer.

12 And the paragraph 14 that was just read
13 establishes just that. We needed to have bad answers
14 and good answers; and none of these answers were mapped.
16:59:02 15 Why did we go to a legal vendor to create memos?
16 Because we needed legal memos to create. We did not ask
17 them -- we are going back -- just to use Westlaw, we
18 asked, Can you use Lexis, Westlaw, or in some reputable
19 source.

16:59:19 20 So the purpose here -- and this is the
21 key because the purpose was not to suck in the entire
22 key number system, because that didn't happen. It just
23 didn't happen.

24 The purpose was to get a question, to get
16:59:36 25 judicial quotes, some of which were good -- I mean some

1 of which were great, but the vast majority were not
2 great. Of the 150,000 different quotes, 125,000 were
3 not great quotes. So there's not -- it wasn't mapping.
4 And, again, when you look a lot what they received
5 then -- I mean, you can look at the topics and see that
6 they're by no means extensive; 5,000 out of a hundred
7 thousand topics is by no means extensive. It is not
8 replicating Westlaw. It truly is not.

9 THE COURT: Okay. Thank you.

10 So I have one more question about citing
11 sealed documents. We have a sealed joint pretrial
12 order. It attaches a list of uncontested facts, D.I.
13 619-1.

14 Can the parties get together and provide
15 a redacted version of that? You know, I am not
16 intending to go and quote the names -- you've been
17 careful during this hearing to avoid naming particular
18 lawyers, particular vendors, et cetera. It's not that
19 kind of thing I want to cite it for. But there's a
20 number of facts, the uncontested facts, just to help lay
21 out the story, explain to you and the public and the
22 Court of Appeals and everybody else what was going on.

23 Can the parties both work together to
24 provide a -- something such that the bulk of these items
25 is visible and only portions are redacted, or otherwise

1 discuss with me how I might use some of these
2 uncontested facts in my summary judgment?

3 MR. PARKER: We are going to opt for Door
4 Number 1, at least on this side of the table, and
17:01:32 5 discuss either redact or completely unconfidentialize
6 certain of the claims, but we can work together.

7 MS. CENDALI: We are obviously happy to
8 do that, Your Honor, but sometimes what judges do --
9 just for you to think about, is sometimes they'll issue
17:01:47 10 an opinion to the parties --

11 THE COURT: And offer the opportunity for
12 redaction. And so, look, that is an option. I don't
13 think I'm even going to need to go there in a step. I
14 think it will simplify things if you guys could try --

17:02:04 15 And I -- I've got an obligation to look
16 out for the First Amendment right as that with regards
17 to the public --

18 MS. CENDALI: And I can't dispute that.

19 THE COURT: Right. So why don't you two
17:02:14 20 work together, come back to me, you know, ten days, with
21 a proposed, here is the stuff in here that we really
22 think needs to remain under seal. There will be a
23 version of it filed under seal, there will be a redacted
24 version that's public.

17:02:27 25 I'll see -- it isn't likely that I can

1 write the whole opinion using the redacted version. If
2 there are portions otherwise then I would provide the
3 usual, here is a version released under seal, you guys
4 have 14 days to propose redactions to it. I am trying
17:02:43 5 to move the case along so I think that would be helpful
6 if you could work on that.

7 MS. CENDALI: And that's fine,
8 Your Honor.

9 And to be clear, we were erring on the
17:02:51 10 side of caution in not naming names, but I think that
11 our particular view is there's -- the movers and shakers
12 name names. I think that they are already in the
13 complaint and public knowledge, and I think that would
14 be fine in the judicial opinion.

17:03:10 15 THE COURT: Okay. If you guys can agree
16 upon that. I mean, I tend to agree. The bulk of this
17 stuff can be figured out from the complaint. I have no
18 reason -- I avoid dragging in or sharing people in the
19 opinions, it's just distracting. There ought to be a
17:03:27 20 way to do this that allows me to tell the basics of the
21 story that I need to in order to set stage.

22 Okay. Logistics of trial. We will hold
23 the May 12th week as firm. The only problem with the
24 week of May 5th sounds like the unavailability of your
17:03:48 25 expert. So my hope is that we can schedule a pretrial

1 conference. The dates leading up to the trial that
2 involve, you know, a Zoom conference going over jury
3 instructions and motions in limine and things, and then
4 some kind of in-person meeting sometime during the week
17:04:09 5 of May 5th to hammer out the last-minute things that
6 happen.

7 So I ask that you -- let's get some dates
8 on the calendar for these things and hold them in your
9 busy schedules. It sounded like March was busy but we
17:04:23 10 were all able to find some time in early April before we
11 get into the Easter/Passover week for pretrial
12 conference, and then hold another date a few business
13 days before the trial actually starts for something in
14 person in Delaware.

17:04:40 15 So propose some dates, propose a schedule
16 that -- of what that will look like. Obviously, this is
17 all on the assumption there is a trial. But it's better
18 to be prepared because your schedules and mine fill up
19 so early, get so busy, better to put markers down now.

17:05:00 20 Unless I grant summary judgment to ROSS,
21 we are going to have a trial on something and let's talk
22 about making that trial manageable for a jury. Again,
23 just looking down the road, it is not going to be in the
24 opinion, but it is the kind of thing to start thinking
17:05:16 25 about because I am going to try to hustle this opinion

1 out in January in plenty of time for the parties to gear
2 up. And if they decide they want to proceed to trial,
3 they have that right to do, and we will do it on this
4 schedule.

17:05:31 5 I am not going to grant continuances or
6 delays. We will try it May 12th.

7 Thomson Reuters is asking me to grant
8 summary judgment on copyright direct infringement on the
9 premise that a subset of the total headnotes in the case
17:05:44 10 clears the administrative threshold. So what I want to
11 know is, if I did that, what will the trial look like?

12 Is Thomson Reuters going to be seeking
13 damages on a compilation copyright theory instead of on
14 an individual headnote basis? We had a little bit of
17:05:58 15 discussion on damages models here. Is that right?

16 Are we going to be getting into per
17 headnote? You know, I heard something different from
18 Mr. Parker than I heard from Thomson Reuters.

19 And does either side think the jury is
17:06:15 20 going to still need to make determinations on individual
21 headnotes for damages purposes? So we're going to have
22 some, okay, there's partial summary judgment on some
23 liability, but there is going to be, in essence, further
24 liability determinations both on tortious interference
17:06:29 25 and on whatever headnotes were not resolved as a matter

1 of law in the summary judgment opinion.

2 And if we do that, are we going to batch
3 the headnotes in some way? I have not gone and looked
4 at the Docket D.I. 690, these sheets 6 to 11. Batching
17:06:46 5 them those ways, batching them in other ways.

6 I would like to hear from someone on the
7 Thomson Reuters team what your approach is to these
8 questions, and then let me hear from someone on ROSS's
9 team and maybe we can figure out what is agreed upon and
17:07:03 10 what you guys need to meet and confer about and where
11 you affirmatively disagree about at this point in time.

12 MS. CENDALI: Your Honor, to suggest it
13 maybe would be easier for us to do that because I don't
14 think any of us have really come to full terms on this
17:07:20 15 until we see Your Honor's opinion, and maybe it makes
16 sense for once we see the opinion to kind of work out a
17 plan with ourselves and with you as to how to do that.

18 THE COURT: All right. You have a big
19 trial in March but you would think that if I got you an
17:07:40 20 opinion in January that there been plenty of time for
21 both sides to meet, confer, hammer out a schedule in
22 February such that we would look ahead 3 months to May.

23 MS. CENDALI: Absolutely. It's in
24 everyone's interest.

17:07:54 25 THE COURT: Mr. Parker.

1 MR. PARKER: Agreed. My head exploded
2 when you asked those questions.

3 THE COURT: All right.

4 MS. CENDALI: I join in Mr. Parker's
5 statement.

6 THE COURT: All right. Well, that makes
7 sense. Let's take a recess of 5 to 10 minutes. I need
8 to confer a little bit and think about what additional
9 items I have, whether we need to reconvene tomorrow or
10 not. So let's recess.

11 MS. CENDALI: For what it's worth,
12 Your Honor, as you think, obviously we cleared these
13 days to be here with you, but Mr. Parker and I did agree
14 on one thing which is since none of us live in
15 Philadelphia, if we're able to get things done today, we
16 would prefer it.

17 THE COURT: You would both prefer that,
18 even if I if need to hold open the possibility that
19 oops, let's do a zoom or something else tomorrow for
20 some loose ends.

21 MS. CENDALI: Well, we will do whatever
22 you would like, but clearly we could do that or whatever
23 Your Honor would like. That's our preference.

24 THE COURT: Very good. Let me consider
25 what we can do.

1 (Brief Recess.)

2 THE COURT: We can let you go home. I'm
3 sure there are going to be some -- you are going to get
4 me some of the spreadsheets in electronic, native, Excel
17:10:51 5 format. There are going to be some documents when there
6 was a reference to such and such, what does that D.I.
7 translate into. A lot of that can be done by e-mail.
8 If there's a need to do some of it by zoom we can. But
9 I think we should just wrap it here and the Court will
17:11:11 10 get hard at work.

11 Because I think the sooner I can get you
12 an opinion -- and as I said I don't think it's realistic
13 to get the whole thing out in December, but I think I
14 can get you something in January, not at the very end of
17:11:25 15 January, I am going to shoot for the middle of January,
16 in time such that I will expect you to come back with
17 some concrete proposals in early February about what the
18 next steps are.

19 But I also am going to need from you --
17:11:43 20 what were the other action items? Excel, can we get
21 those in 7 to 10 days?

22 MS. CENDALI: You should -- in the best
23 senior partner's statements you should get that by
24 tomorrow, Your Honor.

17:12:02 25 MR. PARKER: Best seated partner

1 statement Crinesha will be the one who approves or not.

2 THE COURT: That's great. You guys are
3 going to agree upon some dates that we are going to hold
4 for a Zoom pretrial conference in April and in-person --
17:12:20 5 the 2 days -- what would that be May 8th, 9th, something
6 like to before the trial itself starts because I find it
7 is helpful to wrap up as many loose ends so that when
8 we're picking the jury and all that we hit the ground
9 running.

17:12:39 10 So I would hold -- are the 8th and the
11 9th the Thursday and Friday of the week before trial?

12 MR. SIMMONS: Yes, Your Honor.

13 THE COURT: Okay. So let's hold both of
14 those on the calendar. We could consider there is the
17:12:52 15 possibility of doing jury selection on the 9th. There
16 is the possibility -- if they're held on people's
17 calendars we can -- we will have some estimates after
18 the opinion comes out, is there a trial. If there's a
19 trial what issues are on the table for the trial. What
17:13:08 20 is the proposal of how many trial dates are required?

21 We will at that point engineer how is
22 this going to work, how is it going to sequence, how is
23 it going to fit into the ability of the experts,
24 et cetera. All right. Very good.

17:13:19 25 By the way, I want to commend you all.

1 You have been very well prepared. There's a lot of
2 paper. There's a lot of filings in this case. You
3 marshaled them very well. There's been a big team
4 effort. I think we see of course the glory that Mr.
17:13:36 5 Parker and Ms. Cindali have the lead roles here but all
6 the lawyers, the paralegals, the secretaries, the Court
7 expresses its gratitude to you all for a job well done.
8 And whatever happens here it's not going to be because a
9 lack of preparation, it's going to be because you teed
17:13:55 10 up the best arguments on both sides here to help the
11 Court.

12 And you very wisely you have avoided the
13 trap. So let me say this in the presence of the
14 clients. There are clients who think they want their
17:14:08 15 lawyers to be pit bulls and fight every last footnote
16 and every last thing and I will tell you that your
17 lawyers have done you a great service by not squandering
18 the credibility on side issues and tertiary things
19 because that is penny wise pound foolish approach. And
17:14:27 20 the amounts that you are paying your lawyers for their
21 services have been well-spent in terms of good
22 disconcerting judgment and strategy, tactics on what to
23 focus on and the Court is grateful for it.

24 And with that said we will adjourn. And
17:14:42 25 as I said I ask the parties to work together, split the

1 if cost, get the Court a transcript. It will be
2 important for us to get going.

3 MS. CENDALI: Thank you, Your Honor.
4 Thank you for so much time today.

5 C E R T I F I C A T E

6
7 I certify that the foregoing is a correct
8 transcript from the record of proceedings in the
9 above-entitled matter.

10

11

12 /s/ Kim L. Haley, CSR, CRR, RPR
13 12/6/2024

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